SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 727.

THE MISSOURI & KANSAS INTERURBAN RAILWAY COMPANY, WILLIAM B. STRANG, F. R. OGG, ET AL., PLAINTIFFS IN ERROR,

vs.

THE CITY OF OLATHE, KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 16, 1911.

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1 In the Supreme Court of the State of Kansas.

17247.

THE MISSOURI AND KANSAS INTERURBAN RAILWAY COMPANY,
Plaintiff in Error,
v.
THE CITY OF OLATHE, Defendant in Error.

Be it remembered, that on the 9th day of August, 1911, there was filed in the office of the clerk of the supreme court of the state of Kansas, a certified copy of the Notice of Appeal and transcript of the judgment in the above entitled case, which together with the indorsements thereon are in the words and figures as follows, to-wit:

2 Filed Aug. 9, 1910. D. A. Valentine, Clerk Supreme Court.

In the District Court of Johnson County, Kansas.

7112.

No. 17247.

THE CITY OF OLATHE, Plaintiff,
vs.
J. A. EDSON, Receiver of The Missouri & Kansas Interurban Railway Company, Revived in the Name of The Missouri & Kansas Interurban Railway Company; A. Monroe, Eben Baldwin, and J. N. Roberts, Defendants.

Notice of Appeal.

To the said plaintiff and its attorney of record:

You and each of you are hereby notified that the above named defendant, the Missouri & Kansas Interurban Railway Company hereby appeals to the Supreme Court of the State of Kansas, from the judgment of the District Court of Johnson County, Kansas, rendered against said defendant in the above entitled action on the 28th day of June, 1910, for the sum of $10549.50 and costs, and from the judgment of said court denying and overruling the motion of said defendant for a new trial, and for the purpose of having said judgments and each and every order of the court rendered in connection therewith, and all proceedings in the District Court so had and rendered in said action, reviewed by the supreme court of the State of Kansas, and said judgments and orders of said District Court reversed, set aside and held for naught.

S. D. SCOTT,
S. T. SEATON,
Attorneys for Said Defendants.

OR COPY

I, the undersigned, attorney of record for the plaintiff in the above entitled action do hereby acknowledge service on me of the above and foregoing notice of appeal in Olathe, Johnson County, Kansas, on this the 26th day of July, A. D. 1910.

C. L. RANDALL,
Attorney for Plaintiff.

Filed Aug. 9, 1910.
D. A. VALENTINE,
Clerk Supreme Court.

3 STATE OF KANSAS,
Johnson County, ss:

I, S. D. Scott, being first duly sworn upon my oath depose and say that for and on behalf of the Missouri and Kansas Interurban Railway Company, the defendant named in the attached notice of appeal, I did on the 26th day of July, 1910, serve the attached notice of appeal on C. L. Randall, attorney of record for the city of Olathe, the plaintiff named in said notice, in Olathe, Johnson County, Kansas, by delivering to the said C. L. Randall a duplicate of said notice of appeal.

S. D. SCOTT.

Subscribed and sworn to before me this 26th day of July, 1910.

GEO. W. FOLMER,
[SEAL.] *Clerk of the District Court,*
By W. E. FOLMER, *Deputy.*

Filed Aug. 9, 1910.
D. A. VALENTINE,
Clerk Supreme Court.

4 UNITED STATES OF AMERICA:

THE STATE OF KANSAS,
Tenth Judicial District, Johnson County, ss.

Pleas and proceedings in the District Court of the Tenth Judicial District of the State of Kansas, sitting within and for Johnson County, in said State, at the regular term thereof, begun and held at the Court House, in the City of Olathe, in said County and State, commencing on the second day of May, A. D. 1910, as by statute required.

Present, the Honorable J. O. Rankin, District Judge of the said Tenth Judicial District of said State, J. S. Steed, Sheriff of said County, and Geo. W. Folmer, Clerk of said Court within and for said County.

Be it remembered, That at said Term of said District Court within and for said County of Johnson, among other things, the following proceedings were had and entered of record in the Journal of said Court on the 27th day of June, A. D. 1910.

POOR

May Term, Twenty-seventh Day, June 27th, 1910.

Court called pursuant to adjournment.
Present, the Honorable J. O. Rankin, District Judge, and other officers as before.

No. 7112.

THE CITY OF OLATHE
vs.
J. A. EDSON, Receiver of the Missouri and Kansas Interurban Railway Company; A. MONROE, EBEN BALDWIN, and J. N. ROBERTS.

Now on this 27th day of June, 1910, this cause came on for the decision of the Court. The Court having heard the evidence and arguments of counsel at previous sittings of this Court, came plaintiff by C. L. Randall its attorney and also came defendants by Ogg & Scott and S. T. Seaton their attorneys, and thereupon the Court filed the following findings of fact and conclusions of law which are in words and figures as follows, to-wit:

Findings of the Court.

By ordinance number 962, passed the 28th day of January, 1907, the City of Olathe granted to the Missouri & Kansas Interurban Railway Company the privilege of occupying certain streets and avenues of said city for a period of twenty years for the purpose of operating an interurban railway; said franchise ordinance was published February 1st, 1907. The railway company accepted said franchise in writing on the 4th day of February, 1907. Said franchise was granted upon the condition that the grantee pay to the city of Olathe the sum of $9,000.00 as provided by said ordinance in section- 20, 21 and 22, as follows

"SEC. 20. In consideration of granting the aforesaid franchise the grantee agrees to pay to the City of Olathe upon the completion of the work of Water street to be done hereunder, the sum of Five Thousand Dollars ($5,000.00) said sum to — appli-d by the Mayor and the City Council to such one of the two following purposes, as shall seem most desirable, to-wit: (1) To the payment of widening of Park street three feet on each side thereof from Church street to Water Street. (2) To distribute said sum to the property owners on Park Street, between Church Street and Water Street, aforesaid in the same proportion as they would be compelled to contribute to the cost of widening said Park Street between the points aforesaid if said improvement was done in the manner provided by law.

SEC. 21. The grantee shall pay to the City Treasury upon the completion of said work the sum of Four Thousand Dollars (4,000.00) in Cash.

SEC. 22. To secure the payment to the City of Olathe of the sum of Nine Thousand Dollars ($9,000.00) as provided in sections 20 and 21 of this ordinance the grantee shall execute to the said City of

OPY

Olathe an undertaking in the said sum of Nine Thousand Dollars ($9,000.00) with sufficient sureties to be approved by the Council conditioned for the payment, of the said sum to the City as aforesaid as provided in said sections 20 and 21, which said bond or undertaking shall be executed before the grantee begins any work of construction of its said railroad provided for in this ordinance.

On February 4th, 1907, the defendant Railway Company, filed with the Clerk of said City a bond in the sum of $9,000.00 signed by the defendant railway company and by defendants A. Monroe, Eben Baldwin, J. N. Roberts as sureties. This is the bond set out in action number 7112.

6 On February 4th 1907, said railway Company filed its specifications and map of the general plan of said railway, which was thereafter approved by the council.

On the 19th day of March 1907, the mayor and council of said city, amended ordinance number 962, by an ordinance numbered 971, published March 22nd 1907, among other things containing the following sections:

"SEC. 1. In consideration of the granting of the aforesaid franchise the grantee agrees to pay to the City of Olathe upon the completion of the work to be done hereunder, the sum of Eight Thousand Dollars, ($8,000.00) said sum to — applied by the mayor and the city council, to the payment of the cost of widening of Park Street on each side thereof from St. Louis and San Francisco Railway Right of Way to Water Street."

"SEC. 2. To secure the payment of the City of Olathe of the sum of $3,000.00 as provided for in this ordinance which is in addition to the sum of $5,000.00 provided for in said section 20 of said ordinance number 962, the grantee shall before beginning any work of any construction execute a bond with good and sufficient securities, to be approved by the City Council."

"SEC. 3. Section 20 of this ordinance No. 962, is hereby repealed."

"SEC. 4. This ordinance shall take effect and be in force from and after its passage and publication in the official City paper of the City of Olathe."

The additional bond of $3,000.00 as provided in section 2 above, was executed by defendant Railway Company and filed on the 20th day of March, 1907, which said Bond was signed by William B. Strang, F. R. Ogg, J. C. Keepers, J. H. Cosgrove and George H. Hodges as sureties.

On June 4th, 1908 J. A. Edson was duly appointed receiver of said railway company by an order of the circuit court of the United States for the first district of Kansas, and was such receiver at the date of the commencement of case number 7112.

Section 9 of said ordinance provides as follows:

"The location of the tracks, turn-outs, Y's passing tracks and power house and all poles and wires shall be subject to the approval
7 of the City Council * * * all the work and improvements of the said railway company of said city shall be constructed under the supervision of the Mayor and the City Council * * * before doing any work of construction in said City of

Olathe the grantee shall file with the City Clerk plans and specifications of said work to be approved by the City Council.

The map or ground plan of the said proposed railway contained a red line indicating the main line of the said railway, over the streets of said city, and in addition to said main railway the Y on Santa Fe Street was indicated on said map. The said map also contained a red line, which indicated a contemplated turn out, on East Park Street near the State Institution. The specifications filed with the city Clerk by the defendant company specifies in detail the work therein named, but does not mention the "turn out" above mentioned. The Mayor and members of the City Council at the time did not know that the red line above mentioned indicated the turnout, claimed by the defendant.

On August 28th 1907 the city brought an injunction suit restraining the defendant company from laying the said switch or turnout above mentioned, which suit is still pending.

The said Railway Company laid its main tracks together with the Y on Santa Fe Street and commenced operating cars over the entire distance from some time in the month of August 1907, and *ras* contained to use said track down to the present time, excepting the period of a few months when the operation of said railway was interrupted by changing from a motor car service to an electric service.

The turnout above mentioned is not a necessary part of the Construction of said road in order to reasonably operate the same throughout said city, and to the terminus as provided in said ordinance.

The road as contemplated by said franchise was substantially completed within the meaning of said franchise in the month of August, 1907.

8 *Conclusions.*

The contract of said sureties in case No. 7112 was so changed by the City under ordinance No. 971, as to release the said sureties from obligations of said bond.

The said City in case number 7112 is entitled to a Judgment against the said receiver of said railway company, for the sum of $9,000.00 with interest from October 7th, 1908.

The said City is entitled to a Judgment in case number 7090 against the defendants in the sum of $3,000.00 on the bond set out in the petition of said case, with interest from September 24th, 1908.

J. O. RANKIN,
District Judge.

9 And afterwards, to-wit, on June 28th, 1910, the following further proceedings were had and duly entered of record in Journal 33, at page 20, which said record is in words and figures as follows, to-wit:

COPY

Twenty-eighth Day, May Term, June 28th, 1910.

No. 7112.

THE CITY OF OLATHE

vs.

J. A. EDSON, Receiver of the Missouri and Kansas Interurban Railway Company; A. MONROE, EBEN BALDWIN, and J. N. ROBERTS.

And now on this 28th day of June, 1910, at the May term, 1910, this cause came on for hearing on the motion of the plaintiff to correct conclusion of law numbered two, (Heretofore made by this court, on June 27th, 1910,) to read as follows: "The said City in case numbered 7112, is entitled to Judgment against the said receiver, of said railway company for the sum of $9,000.00 with interest from the 15th day of August, 1907."

The plaintiff appeared by its attorney of record C. L. Randall and the defendants appeared by their attorneys of record S. D. Scott and S. T. Seaton, and the court having heard the said motion, arguments of counsel and being well advised in the premises the court doth sustain the said motion.

It is therefore considered ordered and adjudged by the court that conclusion of law numbered two, (Heretofore made by the court on June 27th, 1910) be made to read as follows: The City in case numbered 7112, is entitled to judgment against the said receiver of said railway company for the sum of $9,000.00 with interest from the 15th day of August, 1907."

It is therefore considered, ordered and adjudged by the court that the plaintiff The City of Olathe have and recover of and from J. A. Edson Receiver of the Missouri and Kansas Interurban Railway Company, the sum of $10,549.50 together with 6% interest, per annum thereon from this date and that plaintiff, the City of Olathe recover its costs herein taxed at $—— and let execution issue therefor.

And it is further ordered, and adjudged by the court that the defendants A. Monroe, Eben Baldwin, and J. N. Roberts recover their costs herein.

10 And afterwards, to-wit on July 16th, 1910, the following further proceedings were had and duly entered of record in Journal 33, at page 26, which said record is in words and figures as follows to-wit:

Twenty-ninth Day, May Term, July 16th, 1910.

No. 7112.

THE CITY OF OLATHE

vs.

J. A. EDSON, Receiver of the Missouri and Kansas Interurban Railway Company; A. MONROE, EBEN BALDWIN, and J. N. ROBERTS.

Now on this 16th day of July, 1910, at the May Term 1910, this cause came on for hearing, on the motion of the defendant for a new trial herein filed.

The plaintiff appeared by its attorney of record C. L. Randall and the defendant appeared by his attorneys of record S. D. Scott and S. T. Seaton, and the court having heard the said motion, arguments of counsel and being well advised in the premises, the court doth overrule the said motion.

It is therefore considered, ordered and adjudged by the court that the said motion be and the same is hereby overruled, to which ruling, order and judgment of the court the defendant at the time duly excepted and excepts.

11 And afterwards, to-wit on July 16th, 1910, the following further proceedings were had and duly entered of record in Journal 33, at page 26, which said record is in words and figures as follows to-wit:

Twenty-ninth Day, May Term, July 16th, 1910.

No. 7112.

THE CITY OF OLATHE
vs.
J. A. EDSON, Receiver of the Missouri and Kansas Interurban Railway Company; A. MONROE, EBEN BALDWIN, and J. N. ROBERTS.

Now on this 16th day of July, 1910, at the May Term, 1910, this cause came on for hearing on the motion of the plaintiff for a new trial herein filed.

The plaintiff appeared by its attorney of record, C. L. Randall, and the defendant appeared by his attorneys of record S. D. Scott and S. T. Seaton, and the court having heard the said motion arguments of counsel and being well advised in the premises the Court doth overrule the said motion.

It is therefore considered, ordered, and adjudged by the court that said motion be and the same is hereby overruled to which ruling, order and judgment of the court the plaintiff at the time duly excepted and excepts.

12 Filed Aug. 9, 1910. D. A. Valentine, Clerk Supreme Court.

THE STATE OF KANSAS,
Tenth Judicial District,
Johnson County, ss:

I, Geo. W. Folmer, Clerk of the District Court of the Tenth Judicial District of the State of Kansas, sitting within and for the County aforesaid, do hereby certify the above and foregoing to be true, full and complete copies of the notice of appeal, affidavit of S. D. Scott, Findings of the Court, Journal Entry of Pl't'ffs, "Motion to Modify Conclusions of law, and Journal Entry of Def't for a new trial in the therein entitled cause, as the same remains of record in my office.

COPY

Witness my hand, and the seal of said Court at my office in Olathe, this the 8th day of August A. D. 1910.

[SEAL.]

GEO. W. FOLMER,
Clerk of the District Court,
By —— ——, *Deputy.*

17247. District Court, Johnson County, Kansas. City of Olathe, Appellant, vs. J. A. Edson, Receiver, etc., et al. Notice of Appeal & Proof. Transcript of J. E. of Judg't. Filed Aug. 9, 1910. D. A. Valentine, Clerk Supreme Court.

13 Be it remembered, that on the 7th day of January 1911, there was filed in the office of the clerk of the supreme court of the state of Kansas, an abstract of the record which with the indorsements thereon is in the words and figures as followws, to wit:

14 17247.

Filed Jan. 7, 1911. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 17247.

THE CITY OF OLATHE, Appellee,
vs.
J. A. EDSON, Receiver of the Missouri and Kansas Interurban Railway Company, Revived in the Name of The Missouri and Kansas Interurban Railway Company, Appellant.

APPELLANT'S ABSTRACT.

S. D. Scott, Attorney for Appellant.

15 In the Supreme Court of the State of Kansas.

No. 17247.

THE CITY OF OLATHE, Appellee,
vs.
J. A. EDSON, Receiver of the Missouri and Kansas Interurban Railway Company, Revived in the Name of The Missouri and Kansas Interurban Railway Company, Appellant.

Appellant's Abstract.

On the 7th day of October, 1908, the appellee began an action in the district court of Johnson county Kansas, against the appellants to recover the sum of $9,000*.*00 and interest al-eged to be due and owing from appellants to appellee upon a certain bond executed by said appellants in favor of said appellee.

POOR

The petition alleged the passage of an ordinance by appellee granting to The Missouri Interurban Railway Company a franchise giving the said Railway Company the right to use and occupy certain streets in the City of Olathe upon which to operate a line
16 of railway to be operated by electricity or other suitable motor power except steam.

It was further alleged that upon the completion of said railway and its operation by said railway company, the said railway company agreed to pay to the City of Olathe the sum of $9,000.00 according to the terms of said franchise, and that said railway company executed a bond to the said city binding itself to pay said sum of money, and that said A. Monroe, Eben Baldwin and J. N. Roberts signed bond as sureties. The petition further alleged that said railway was completed on or about the 1st day of August, 1907, as provided in said franchise and was fully equipped and in operation on or about said date, and that said railway company had failed, neglected and refused to pay to said city the said sum of $9,000.00 and demanded judgment for said sum with 6 per cent interest from August 1st, 1907, and costs.

The Sections of said Ordinance No. 962 granting said franchise and providing for the payment of said $9,000.00 and pertinent to the questions in this case are as follows:

SEC. 9. The location of the tracks, turnouts, Y's, passing tracks and power house and all poles and wires shall be subject to the approval of the city council. All wires suspended from trolley poles shall be not less than eighteen feet above the surface of the street and all work and improvements of said railway company of said city shall be constructed under the supervision of the Mayor and the City Council, so as to afford the least interference both in construction and maintenance with a free and unrestricted use of the streets by the public consistent with the construction and maintenance of said railway. Before doing any work of construction in said City of Olathe, the grantee shall file with the City Clerk plans and specifications of said work to be approved by the city council.

SEC. 20. In consideration of the granting of the aforesaid
17 franchise the grantee agrees to pay to the City of Olathe upon the completion of the work to Water street to be done hereunder, the sum of Five Thousand Dollars ($5,000) said sum to be applied by the Mayor and the City Council to such one of the two following purposes as shall seem most desirable to-wit:

(1.) To the payment of the cost of widening Park street three feet on each side thereof from Church street to Water street.

(2.) To distribute said sum to the property owners on Park street, between Church street and Water street, aforesaid in the same proportion as they would be compelled to contribute to the cost of widening said Park street between the points aforesaid if said improvement was done in the manner provided by law.

SEC. 21. The grantee shall pay into the City treasury upon the completion of said work the sum of Four Thousand Dollars ($4,000) in cash.

OPY

SEC. 22. To secure the payment to the city of Olathe of the sum of Nine Thousand Dollars ($9,000) as provided in Sections 20 and 21 of this ordinance the grantee shall execute to the said City of Olathe an undertaking in the said sum of Nine Thousand Dollars ($9,000) with sufficient sureties to be approved by the Council conditioned for the payment of the said sum to the said city as provided in said Sections 20 and 21, which said bond or undertaking shall be executed before the grantee begins any work of construction of its said railroad provided for in this ordinance.

Afterwards and on March 19, 1907, said Sec. 20, Ordinance No. 962 was amended by Ordinance No. 971 which is as follows:

Ordinance No. 971.

An ordinance amending section twenty of Ordinance No. 962, being an ordinance granting to the Missouri and Kansas Interurban Railway Company the right to construct, maintain and operate a railway, to be operated by electricity or any other suitable
18 motive power except steam, over and along certain streets within the City of Olathe, and to repeal said section twenty of said Ordinance.

Be it ordained by the Mayor and Councilmen of the City of Olathe.

SEC. 1. In consideration of the granting of the aforesaid franchise the grantee agrees to pay to the City of Olathe, upon the completion of the work to be done thereunder, the sum of Eight Thousand Dollars ($8,000.00) said sum to be applied by the Mayor and Council to the payment of the cost of widening Park street on each side thereof from the right of way of the St. Louis and San Francisco Railroad to Water street.

SEC. 2. To secure the payment to the City of Olathe of the additional sum of $3,000.00 provided for in this ordinance which is in addition to the sum of $5,000.00 provided for in said section twenty of said ordinance No. 962, the grantee shall, before beginning any of the work of construction, execute a bond with good and sufficient sureties to be approved by the City Council.

SEC. 3. Section twenty of said Ordinance No. 962 is hereby repealed.

SEC. 4. This ordinance shall take effect and be in force from and after its passage and publication in the city official paper of the City of Olathe.

Passed and approved this 19th day of March, 1907.

Said ordinance was duly published.

Afterwards on Nov. 6, 1908, the defendant railway company by J. A. Edson then the receiver of said company filed its answer to said petition which was a general denial and further answered, specially denied that the said railroad described and mentioned in said petition, is or has been completed and denies that the said sum

POOR

of $9,000 provided for in said bond sued upon in this action is due, or any part of it, but said defendant avers the fact to be, that
19 said railroad is not completed, as provided in the said franchise ordinance, and that no part of the said sum named in said bond is due.

To this answer the plaintiff filed a reply which was a general denial. The trial of the case was begun at the September, 1909, term of the district court of Johnson county, and was finally concluded and the court made certain findings of fact and conclusion of law at the May term, 1910, of said court.

These findings are as follows:

By Ordinance Number 962, passed the 28th day of January, 1907, the City of Olathe granted to the Missouri and Kansas Interurban Railway Company the privilege of occupying certain streets and avenues of said City for a period of twenty years, for the purpose of operating an Interurban Railway; said franchise ordinance was legally published February 1st, 1907. The railway company accepted said franchise in writing on the 4th day of February, 1907. Said franchise was granted upon the condition that the grantee pay to the City of Olathe the sum of $9,000.00 as provided by said ordinance in sections 20, 21 and 22, as follows:

"SEC. 20. In consideration of the granting of the aforesaid franchise the grantee agrees to pay to the City of Olathe upon the completion of the work to Water street to be done hereunder, the sum of Five Thousand Dollars ($5,000) said sum to be applied by the Mayor and the City Council to such one of the two following purposes as shall seem most desirable, to-wit:

(1.) To the payment of the cost of widening Park street three feet on each side thereof from Church street to Water Street.

(2.) To distribute said sum to the property owners on Park street, between Church and Water street, aforesaid in the same proportions as they would be compelled to contribute to the cost of widening said Park street between the points aforesaid if said im-
20 provement was done in the manner provided by law."

"SEC. 21. The grantee shall pay into the city treasury upon the completion of said work the sum of Four Thousand Dollars ($4,000) in cash."

"SEC. 22. To secure the payment to the City of Olathe of the sum of Nine Thousand Dollars as *as* provided in sections 20 and 21 of this ordinance the grantee shall execute to the said city of Olathe an undertaking in the said sum of Nine Thousand Dollars ($9,000), with sufficient sureties to be approved by the Council conditioned for the payment of the said sum to the said city as provided in said Sections 20 and 21, which said bond or undertaking shall be executed before the grantee begins *and* work of construction of its said railroad provided for in this ordinance."

On February 4th, 1907, the defendant railway company filed with the clerk of said City a bond in the sum of $9,000.00 signed by the defendant railway company and by defendants, A. Monroe, Eben Baldwin, J. N. Roberts as sureties. This is the bond set out in action Number 7112.

COPY

On February 4th, 1907, said railway company filed its specifications and map of the general plan of said railway, which was thereafter approved by the Council.

On the 19th day of March, 1907, the Mayor and Council of said city amended Ordinance Number 962 by an Ordinance Numbered 971, published March 22, 1907, among others containing the following sections:

"SEC. 1. In consideration of the granting of the aforesaid franchise, the grantee agrees to pay to the City of Olathe upon the completion of the work to be done hereunder, the sum of Eight Thousand Dollars ($8,000,) said sum to be applied by the Mayor and the City Council to the payment of the cost of widening Park street on each side thereof from St. Louis and San Francisco Railway right of way to Water street."

"SEC. 2. To secure the payment *of* the City of Olathe of the sum of $3,000 provided for in this ordinance which is in ad-
21 dition to the sum of $5,000 provided for in said section 20 of said ordinance No. 962, the grantee shall, before beginning any work of construction execute a bond with good and sufficient securities to be approved by the City Council."

"SEC. 3. Section 20 of said Ordinance No. 962 is hereby repealed."

"SEC. 4. This ordinance shall take effect and be in force from and after its passage and publication in the official city paper of the city of Olathe."

The additional bond of $3,000 as provided in section 2 above, was executed by defendant railway company and filed on the 20th day of March, 1907, which said bond was signed by William B. Strang, F. R. Ogg, J. C. Keepers, J. H. Cosgrove and George H. Hodges as sureties.

On June 4th, 1908, J. A. Edson was duly appointed receiver of said railway company by an order of the Circuit Court of the United States for the first District of Kansas, and was such receiver at the date of the commencement of case Number 7112.

Section 9 of said ordinance provides as follaws:

"The location of the tracks, turnouts, Y's, passing tracks and power house and all poles and wires shall be subject to the approval of the City Council — all the work and improvements of the said railway company of said city shall be constructed under the supervision of the Mayor and the City Council. — Before doing any work of construction in said City of Olathe the grantee shall file with the City Clerk plans and specifications of said work to be approved by the City Council."

The map or ground plan of the said proposed railway contained a red line, which is claimed by the defendant company to indicate of said city, and in addition to said main railway the Y on Santa Fe street was indicated on said map. The said map also contained a red line, which is claimed by the defendant company to indicate a contemplated "turn-out" on East Park street, near the State Institution. The specifications filed with the city clerk by the defend-
ant company specifies in detail the work therein named, but
22 does not mention the "turnout" above mentioned. The Mayor and members of the City Council at the time did not

know that the red line above mentioned indicated the "turnout" claimed by the defendant.

On August 28th, 1907, the city brought an injunction suit restraining the defendant company from laying the said switch or turn out above mentioned, which suit is still pending.

The said railway company laid its main track, together with the Y on Santa Fe street, and commenced operating cars over the entire distance from some time in the month of August, 1907, and has continued to use said track down to the present time, excepting a period of a few months when the operation of said railway was interrupted by changing from a motor car service to an electric service.

The turn out above mentioned is not a necessary part of the construction of said road in order to reasonably operate the same through said city, and to the terminus, as provided in said ordinance.

The road as contemplated by said franchise was substantially completed within the meaning of said franchise in the month of August, 1907.

Conclusions.

The contract of the said sureties in case Number 7112 was so changed by the city, under ordinance Number 971, as to release the said sureties from obligations of said bond.

The said city in case Number 7112 is entitled to a judgment against the said Receiver of said railway company for the sum of $9,000 with interest from August 15th, 1907.

The said city is entitled to a judgment in case Number 7090
23 against the defendants in the sum of $3,000 on the bond set out in the petition in said case, with interest from August 15th, 1907.

J. O. RANKIN,
District Judge.

Judgment was given in favor of the sureties and they were released from any liability on the bond. Afterwards and in due time the defendant railway company filed a motion for a new trial upon the following grounds:

1. Irregularity in the proceedings of the Court, prevailing party, abuse of discretion by which the defendant was prevented from having a fair trial.
2. Misconduct of the prevailing party.
3. Accident and surprise which ordinary prudence could not have guarded against.
4. Excessive damages appearing to have been given under the influence of passion and prejudice.
5. Error in the assessment of the amount of recovery being to large.
6. The decision is not sustained by sufficient evidence and is contrary to law.
7. Newly discovered evidence material to said defendant which could not, with reasonable diligence, have been discovered and produced at the trial.

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8. Error of law occurring at the trial and excepted to at the time by said defendant.

The trial court duly overruled the appellant's motion for a new trial. Exceptions were duly taken to the rulings and judgment of the court. In due time proper notice of appeal was duly served upon the attorney for the appellee and the case removed to this court for review.

On behalf of the appellee the following testimony was introduced:

Harry Iles.

Testified that he was the city clerk of the city of Olathe and the custodian of its records. That the appellant built a line of railway from Kansas City to the city limits of Olathe and operated its cars for a time and after accepting the franchise granted by ordi-
24 nance No. 962, built a track along Park street and around the square to the northwest corner where a "Y" was constructed and afterwards operated its cars to that point. That the acceptance of the franchise was dated February 4th, 1907, and the work was to be completed in six months, that the track was completed about that time and cars had been run over the track continuously since that time, with the exception of a few months when the motive power was being changed from gasoline motors to electricity.

That the $12,000 provided for in the franchise ordinance No. 962 had not been paid. Ordinance No. 962, was introduced in evidence being the ordinance granting the franchise, and also Ordinance No. 971 being a- amendment of section 20 of Ordinance No. 962. Appellee also offered in evidence the map or plat of the tracks of the appellant within the city limits of Olathe marked exhibit "A" and which is attached hereto.

Also Exhibit "B" being the specifications of appellant's tracks within the city limits which is copied herein as follows:

EXHIBIT B.

Specifications for the Work to be Done by the Missouri and Kansas Interurban Railway Company under its Franchise Granted by the City Council of Olathe on the 28th Day of January, 1907.

Route.

The Route of the Missouri and Kansas Interurban Railway Company shall begin at or near the point where the center line of the track of the said Missouri and Kansas Interurban Railway Company as now located and constructed, would, if extended, intersect the center line of Park street in the City of Olathe, thence extending in a westerly direction over and along said Park street to the westerly side of the public square, thence in a northerly direction over and along Kansas Avenue to Santa Fe Avenue, thence over and along Santa Fe Avenue in an easterly and westerly
25 direction from the center line of said Kansas Avenue such distance, which shall not exceed three hundred and fifty

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(350) feet or thereabouts, as may be necessary for the proper construction and operation of a "Y" track which may be installed and constructed at the corner of said Kansas Avenue and Santa Fe Avenue, all as is more fully shown in the accompanying map or plat, to which reference is hereby made.

Grade.

The grade of the surface of the track shall conform with the surface of the pavement as nearly as practicable.

Ties.

2640 standard ties to the mile. Ties to be properly laid in concrete.

Rails.

Steel rails weighing 60 or 70 pounds to the yard.

Frogs and Switches.

All frogs and switches shall be made standard and shall be laid in such manner as to conform strictly to the surface of the pavement.

Frisco R. R. Crossing.

The entire crossing to be constructed of 75 pounds Frisco rails and 70 pound A. S. C. E. pattern. All tracks doubly reinforced with necessary guard rails etc., making a standard railroad crossing.

Removing Brick, Concrete and Macadam.

Brick paving, concrete or macadam base shall be taken up a sufficient width and depth so as to bring the top of the rail to grade.

Replacing Concrete, Macadam and Brick.

The putting down of concrete or macadam base and the laying of a brick shall conform with the original specifications under which the paving of the streets, occupied by the railway company with its tracks, was done.

General.

The entire work of construction shall be done in a workmans*hip*
manner, and so as not to unduly obstruct traffic during the
26 prosecution of the work, and the track, when completed shall be laid in such manner as to afford the least interference possible with the use of said streets by the public, consistent with the reasonable operation requirements of the railway, and under the supervision of the City Engineer of said City.

F. R. OGG, *Mayor.*

COPY

Attest:
HARRY ILES,
City Clerk.

The bond for $9,000 marked Exhibit "C" upon which suit was brought was introduced and is as follows:

"Know all men by these presents, that we, the Missouri and Kansas Interurban Railway Company, a corporation organized under the laws of the state of Kansas, as principal and A. Monroe of Lawrence, Kansas, and Eben Baldwin of Lawrence, Kansas, and J. N. Roberts of Lawrence, Kansas, as sureties, acknowledge ourselves to owe and be indebted to the City of Olathe, Kansas, a city of a second class duly organized as such under the statutes of the state of Kansas, in the sum of Nine Thousand Dollars, for the payment of which well and truly to be made we bind ourselves, our executors and administrators by these presents.

The condition of this undertaking is such that, whereas, the above bounden Missouri and Kansas Interurban Railway company has heretofore to-wit on the 28th day of January, 1907, been granted the right, privilege and authority to construct, maintain and operate a railway to be operated by any other suitable motive power except steam over and along certain streets within the City of Olathe, Kansas, which said right, privilege and authority, together with the terms upon which the same was granted is fully set out in ordinance No. 962 of the city entitled and ordinance granting to the Missouri and Kansas Interurban Railway Company the right to construct, maintain and operate a railway to be operated by electricity or other suitable motive power, except steam, over and along certain streets within the City of Olathe passed and approved January 28th, 1907, and which ordinance is by reference thereto made a part hereof, as if fully set forth herein; and whereas the said Missouri and Kansas Interurban Railway Company has accepted the terms and
27 conditions of said ordinance in the manner and form as provided in said ordinance.

Now therefore, if the said Missouri and Kansas Interurban Railway Company shall pay to the said City of Olathe the sum of Nine Thousand Dollars, as provided in Sections 20 and 21 and 22 of said ordinance No. 962, then this obligation shall be null and void, otherwise to remain in full force and effect.

THE MISSOURI AND KANSAS INTERURBAN RAILWAY COMPANY,
By A. F. HUNT, JR., *Pres't.*
A. MONROE.
EBEN BALDWN.
J. N. ROBERTS.

Attest:
[SEAL.] CHARLES E. N. COLES, *Secretary.*

This bond is correct in form and I regard the sureties as amply sufficient.

S. T. SEATON,
City Attorney.

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JOHN GRIM, J. F. MAHAFFIE and CHAS. W. CORSUCH testified that they were members of the city council during the time that appellant was constructing its road within the city limits of Olathe, and that the road had been operated within said city for some time prior to the commencement of this action and that the track was completed to the northwest corner of the public square which was the terminus as provided in the franchise.

F. F. GREENE testified that he was Mayor of the City of Olathe and that the $12,000 had not been paid.

Appellee rested its case.

At the close of the appellee's evidence the appellant and the sureties on the bond each filed demurrers and it was agreed that said demurrers should be argued at the close of the trial.

The appellant then introduced Mr. THOMAS RILEY who testified as follows:

That he was the general manager of the appellant railway company, and that he had full charge of the construction of its line of railway; that he was familiar with the construction of railways having had 20 years' experience and with the plats, plans and specifications; that the red lines on a plat indicate and show the
28 center line of construction, that during the construction of said road within the city limits Mr. Ferrell, the city engineer was superintending the work on the part of the city; that some time along about the 27th or 28th of August, 1907, he undertook to construct a switch or turn out where the double lines appear on the plat between Cooper and State streets on Park street, and was served with an injunction after tearing up the brick; that the material for the construction of said switch was ordered about the 1st of April, 1907, at the same time that the material was ordered for the "Y" at the northwest corner of the square; that the said switch or turn out was a part of, and a necessary part of the said Interurban Railroad in the city of Olathe; that it was necessary for passing cars; and that the city engineer helped locate the switch at the time he began its construction; that Interurban railroads are often operated before the minor details are carried to completion, and that was done in this case.

FRED P. O'FLAHERTY testified as follows: That he was a civil engineer and had been for 28 years; that he was chief engineer of the appellant railway company at the time it was building its line within the city limits of the city of Olathe; that the plat, exhibit "A" showing the line of railway inside the city limits was prepared in his office under his directions; that the red line in the center of the street indicated the track; that certain red lines at the northwest corner of the square indicated the "Y" switch and the double red line represented the switch or turn out, and that it was usual in making plans or plats of that kind, the railway track was designated by red lines; that during the construction of the track the city engineer was present, and was also present when the switch or turn out was

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located and when the work of construction began; that he was not in the employ of the appellant at the time of the trial and had not been for more than a year.

29 It was admitted by appellee that the original plans and specifications and plat, marked exhibits "A" and "B" were approved by the city council of the City of Olathe prior to the beginning of any work. (Record 38.)

It was admitted by the appellee that on the 28th day of August, 1907, the appellant railway company, was, by order of the probate judge of Johnson county, Kansas, in an action pending in the district court of Johnson county, Kansas, in which the City of Olathe was plaintiff and the Missouri and Kansas Interurban Railway Company was defendant, temporarily enjoined from constructing a switch which it was then attempting to construct on Park street between Cooper and State streets, being the same switch that is in controversy in this case, and that the case in which said temporary injunction was granted remains undisposed of and the temporary injunction was still in force and that said injunction suit has been continued by consent at each term of court, and is still pending.

Appellant rested its case.

Appellee offered the following further testimony:

ROY MURRAY testified that he was the present city engineer and had been since November, 1907, and has had some experience in that line of business; that the double red line might indicate a turnout or it might indicate a slip of the pen, and that it would not necessarily indicate a turn out or switch unless the same were in the specifications; also that the red lines at the northwest corner of the square indicated a "Y" and that when the two lines meet at each end, it probably would indicate a switch.

It is admitted by counsel for the defendant, J. A. Edson, Receiver for the Missouri and Kansas Interurban Railway Co. that Exhibit "1," marked by the stenographer, under date of August 5, 1907, addressed to the Mayor and Council of the City of Olathe, and signed by the Missouri and Kansas Interurban Railway Company by A. F. Hunt, Jr., its President, and also by S. D. Scott,

30 attorney and Frank Doster of counsel, is one of the files of the City of Olathe, having been filed August 6th, 1907, also that it bears the signature of A. F. Hunt, Jr., who was at that time President of the Missouri and Kansas Interurban Railway Co.

It is also admitted that Exhibit "2," marked by the stenographer, purporting to be a communication addressed to the Mayor and Council of the City of Olathe, Kansas, bearing no date apparently on its face, which was filed August 14th, 1907, signed by the Missouri and Kansas Interurban Railway Company By A. F. Hunt, Jr., its President, also by Frank Doster of counsel is one of the files of the City of Olathe, Kansas, and that the signature appended thereto is the signature of A. F. Hunt, Jr., President of the Missouri and Kansas Interurban Railway Company.

Mr. RANDALL: Now, if your Honor please, we desire to offer in evidence as to the defendant, J. A. Edson, Receiver of the Missouri and Kansas Interurban Railway Company, but not as against any

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other of the defendants, in the case numbered 7112, being the case of the City of Olathe vs. J. A. Edson, Receiver, et al., a communication marked Exhibit "1," under date of August 5th, 1907, addressed to the Mayor and Council of the City of Olathe. We offer it for the purpose of aiding in the construction of the franchise ordinance granted by the City of Olathe to the defendant, the Missouri and Kansas Interurban Railway Company said contract being uncertain or ambiguous in its terms, and appearing so upon its face; a communication from the Company to the City, relative to the payment of this money.

Mr. SCOTT: We object to this offer made by the plaintiff as incompetent, irrelevant and immaterial, and hearsay, and for the further reason that no person's name appears attached to that; this party had no authority to make any statements that would be binding upon the defendant in this action, and no authority to
31 make any admissions that would be binding upon the defendant in this action, or to make or create any obligation that is not legally due.

The COURT: It will be received subject to the objection; it is offered for that one purpose.

Mr. SCOTT: We except to the ruling of the Court.

EXHIBIT "1."

AUGUST 5TH, 1907.

To the Mayor and Council of the City of Olathe:

GENTLEMEN: Replying to your notice that on Monday, August 5, 1907, consideration would be given to the subject of the forfeiture of the franchise to operate our line of road into your City because of the claim made by you that our road has not been completed within the time agreed, and because of our failure to pay the sum of $12,000 mentioned in the franchise ordinance and because of our failure "to do and perform many other things in said ordinance mentioned," we beg to say that we are unadvised as what is meant by your claim of forfeiture "to do and perform other things" as stated by you, and therefore are unable to make specific reply thereto; but we deny that we have done or omitted anything constituting a violation of said ordinance and we further say that the time for the completion of our line has not yet expired under the terms of said ordinance, and that if any sum of money is due to the City of Olathe under the terms of said ordinance the time for its payment has not yet arrived, and we therefore protest against any action by you looking to an attempt of the forfeiture of any of our rights of said ordinance, and we assert that we have always been ready to comply and have complied with all of our engagements with the City and we are ready to pay any money legally due from us to it when the same becomes legally payable, and to perform all our contract obligations with the City.

THE MISSOURI AND KANSAS INTERURBAN RAILWAY COMPANY,

By A. F. HUNT, *President.*
S. D. SCOTT, *Attorney.*

FRANK DOSTER,
Of Counsel.

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(Endorsed:) Filed August 6th, 1907. Harry Iles, City Clerk.

Mr. RANDALL: Now we desire to offer in evidence Ex-
32 hibit "2," purporting to be a communication to the Mayor and Council of the City of Olathe, Kansas, and signed by the Missouri and Kansas Interurban Railway Company by A. F. Hunt, Jr., its President, and also by Frank Doster of counsel, bearing no date on its face, but was filed August 14th, 1907, by the clerk of the City; we offer it in evidence as against the Receiver of the Missouri and Kansas Interurban Railway Company for the same purpose that we offered Exhibit "1," but not as against the Sureties who are co-defendants in case number 7112.

Mr. SCOTT: We make the same objection as we did to Exhibit "1."

The COURT: It will be the same ruling.

Mr. SCOTT: We except.

EXHIBIT "2."

To the Mayor and Council of the City of Olathe:

The Missouri and Kansas Interurban Railway Company answering your communication of August 8th, 1907, claims that it is entitled to such extension of time for the completion of its line of railway in the City of Olathe, and for the payment of any monies provided to be paid under the ordinance of January 28th, 1907, as shall equal the time that has elapsed during the pendency of a certain suit brought by the State of Kansas in the District Court of Johnson county, Kansas, to annul the franchise rights of said company under the said ordinance of January 28th, 1907, and during the time that the Mayor and Council of the City of Olathe were considering the validity of said franchise ordinance and amending the provision thereof which provided for a payment by the company to citizens residing on Park street; that is to say, the railway company claims six months from the 21st day of March, 1907, as the time within which work under its said franchise is to be done.

The railway company further claims that the sum of $8,000 for widening Park street provided to be paid in the aforesaid amendment to the franchise of January 28th, 1907, will not be due until the Mayor and Council of Olathe have authorized the widen-
33 ing of said street and the work of widening has been completed.

The railway company further claims damages against the City of Olathe by reason of its unlawful repeal of the franchise ordinance granted to the railway company by the Mayor and Council of said City on June 8th, 1906, and the refusal of said city to allow the railway company to construct its line under said ordinance and claims that said damages constitute a valid offset against any claim which the City of Olathe may make for the payment of the $12,000 mentioned in the ordinance of January 28th, 1907.

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The railway company is willing to enter into negotiations with the City of Olathe for an amicable adjustment of its said claim of damages herein above mentioned, or will join with the city in an amicable suit at law to determine the amount of the city's liability under the claim of damages her-in made.

THE MO. AND KAS. INTERURBAN RY.
A. F. HUNT, *President.*

FRANK DOSTER,
Of Counsel.

It is stipulated and agreed that exceptions will be saved to all objections.

S. D. SCOTT testified that Mr. Hunt was Vice-President of the appellant, and that Mr. Riley was general manager, of the operating department of the road, but had nothing to do with the financial department, but could not state in detail just what his duties were.

J. M. GRIM testified on behalf of appellee, that he was a member of the City Council and acting Mayor at a time when Mr. Riley, the general manager of appellant railway company was present at the meeting of the council and it was his recollection it was before the appointment of the Receiver. He was asked the following question:

Q. Now you may state what if anything Mr. Riley said at that time with reference to the matters at difference here, between the City and the defendant Railway Company, as to the
34 payment of any moneys or the extension of any time for its payment?

Mr. SEATON: We object to the witness making any statement, testifying to any statement made with Mr. Riley, for it is evidently intended from the statement of counsel to show an admission on the part of the executive officers of the Company about a matter in which he had no authority to act, and in which no executive officer of the Company could act without having authority from the Board of Directors of the Company, and because it is an attempt to introduce in evidence here in the statement of Mr. Riley that was in the nature of an offer to compromise certain differences between the City of Olathe and this Railroad Company or the Receiver, (for at the time laid for this witness and this conversation this Railroad was in the hands of the Receiver, J. A. Edson, who was an officer of the United States Circuit Court for the Eastern District of Kansas, and as such would have no officer authorized to speak for him in such matters without the consent of the Court. Now Mr. Riley may have been at some other time and is now General Manager of this Railroad Company, the operative agent for the Receiver and as such has no authority to speak for the Receiver in any matters of this kind; no authority even to admit the existence of a debt, that a debt is due, then it is a legal conclusion and is not competent evidence.

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Mr. SCOTT: We object to it for the further reason that the testimony is incompetent, irrelevant and immaterial, and hearsay.

The COURT: If it was matters offered in any way of a compromise it would not be competent.

The COURT: He may answer that subject to their objection.

A. Well, Mr. Riley came before the Council one evening at our regular session and asked for an extension of time.

Q. Extend the time for what?

35 A. For the $12,000.00 that they owed the City and proposed to give a bonded security for the $12,000.00 and the question was raised about the bond, or the surety, and he made the proposition that the Surety Company was all right and they wanted an extension for one year. I made the remark to them, before the Council, that we would give them an extension of time, and for them to make us a bankable note that we could get the money on, that we needed the money for City purposes, and that it was due, and he didn't deny but what it was due, or else he would not have undertook to give us the security for an extension of time.

Mr. SEATON: We move to strike that out, where he didn't deny but what it was due.

The COURT: That may be stricken out, as a conclusion of the witness.

C. V. TOWNLEY testified that he was a member of the City Council of the City of Olathe and had been for about five years and was acquainted with Thos. Riley, general manager for appellant, and that before the Receiver for appellant was appointed he appeared before the City Council and the following question was asked him:

Q. Now you may state what if anything Mr. Riley said with reference to the extension of any time for the payment of this sum of money or for the payment of money that was a matter of difference between the City and the Company at the time he appeared before the Council.

Mr. SCOTT: The same objection that was made to the question propounded to Mr. Grim, as in competent, irrelevant and immaterial, and not shown to have any legal authority to speak for the Company in this matter.

The COURT: The same ruling.

A. Mr. Riley appeared before the Council a great many times for different things, and one time he appeared seeking a settlement of this $12,000.00 due the City, asking for an exten-

36 sion of time and to give a security bond.

Q. He came up there for the purpose of giving a surety company bond, and have the time for payment for that bond fixed a year from that time?

A. He said that was his purpose, yes, sir.

POOR

Q. And he wanted to get rid of all this litigation between the City and the Company?

A. That is exactly what he said; he said he wanted to fix things up, so there would be good feeling on both sides.

Q. There was no mention of any matters except the $12,000?

A. That was all.

Q. He didn't claim any lesser or greater amount?

A. He simply said "we don't deny the claim."

Motion made to strike out the testimony for same reasons made to the introduction was overruled.

C. W. GORSUCH recalled testified as follows. That he was acquainted with Mr. Riley.

Q. You may state what if anything Mr. Riley said with reference to the payment or extension of payment of $12,000.00?

To this question the same objection and ruling was made as was made to the question when propounded to Grim and Townley.

A. He said the same thing and in addition said it was impossible for the Company to pay it, they had no money to pay the claim; could not pay it and he asked for an extension of I think fifteen months.

Q. Have you stated in substance all that they said?

A. He said that the money was due, that they were unable to pay it, and they wanted an extension of time, of fifteen months, in which to pay it, with Mr. Hunt or Mr. Riley.

Mr. SEATON: We ask that be stricken out as a conclusion of law and not binding on the Company.

37 The COURT: It will be overruled at this time.

The witness further stated that Mr. Riley and Mr. Hunt at that time said that their purpose in appearing before the council and the talk was for the purpose of settling up all litigation that was pending between the City and the Railway Company, but he did not remember.

Mr. I. C. Dent another member of the City Council testified to practically the same state of facts over the same objections of appellant.

C. L. Randall, City Attorney, testified that Mr. Riley together with John W. Breyfogle appeared before the City Council and asked for an extension of the payment of the $12,000, and that Mr. A. F. Hunt and Mr. W. B. Strang appeared before the City Council for the same purpose. He said they made no claim that the money was not due and the only claim he knew of was contained in the two letters, Exhibits 1 and 2. This testimony was admitted over the same objections made to similar testimony and hereinbefore set out.

Appellee offered the following resolution being found on pages 365 and 366 of record book "E" being a book containing the minutes of the proceedings of the City Council, of date March 21st, 1910.

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Resolution.

Be it resolved by the Mayor and Council of said City of Olathe, Kans. That whereas on the 28th day of January, 1907, the Mayor and Council of the City of Olathe passed an ordinance granting to the Missouri and Kansas Interurban Ry. Co. the right to construct, operate and maintain an Interurban Railway over certain parts of its streets, including Park street from the Frisco Railroad west to Kansas Avenue. That said ordinance was duly and legally published as required by law. By the terms of Section One (1)
38 it is provided: "Said railroad to consist of a single track laid as nearly as may be in the center of street occupied by it with necessary turnouts, Y's, passing tracks, fixtures and appurtenances needful in the construction and operation of said railway." Section 9 provides in part the location of the tracks, turnouts, Y's, passing tracks shall be subject to the approval of the City Council." Before doing any work of construction in said City of Olathe, the grantee shall file with the City Clerk plans and specifications of said work, to be approved by the City Council" and Whereas, on February 4th, 1907, said Missouri and Kansas Interurban Ry. Co. filed plans and specifications of certain proposed work to be done under said franchise which were on said date approved by the City Council.

Whereas, it is claimed by said Railway Co. that it has the right under its franchise and in accordance with its plans and specifications so filed to construct a side track or turn out on the south side of Park street in front of Lots 5-6 and 7 in Block 2, Hayes' Addition and at a point where it heretofore attempted to install such and was enjoined by the City from so doing; for the reason as alleged in said petition of the City "the construction of the side track and switch and the tearing up of the pavement and concrete on the said street will render said street dangerous and unfit for travel and will interfere with and prevent the use of said portion of said street as a public highway.

Therefore be it resolved by the Mayor and Council of said City, that the approval of the plans and specifications by said City Council in so far as it may be provided therein for the construction of side track or turnout on Park street at the point above indicated by reconsidered, set aside and held for naught, and rejected for the reason that the construction of said side track or turnout at said point would destroy said street permanently at said point as a public highway and will destroy its proper and legitimate use by
39 the public as a street and that said Railway Company be prevented by the City from constructing such side track for the reasons above set forth.

F. F. GREENE, *Mayor.*
R. J. HENHY,
D. L. TEMPLE,
W. S. SPEER,
C. V. TOWNLEY,
Councilmen.

To which appellant made the following objection:

Mr. SEATON: We object to that for the reason it is incompetent, irrelevant and immaterial, and a matter happening since this suit has been on trial; they would not be proper in this case except by a supplemental answer or reply, or some supplemental pleading. Second, that it is a matter affecting our right under these ordinances and could not be taken without some notice of some kind to us to be heard, none being shown; purporting to be a resolution canceling our rights to build a switch at a certain point, done without notice to us and after this suit has been commenced; it could not effect our right to recover in this case or their right to recover in this case in any way whatever because this suit—this money must have been due at the time this suit was brought or they can not now maintain this action, and if the time this suit was brought this was interfered with by the building of this switch under the terms of the contracts and the specifications referred to they have no action, even if this was a valid ordinance, and wiped out our right to build that switch, but in addition to that they have approved our plans and specifications and our right to build there, in which we have shown in evidence that we obtained the special irons, switches, "Y's" and frogs necessary to put that switch in at that point, and with the approval of the Council put it at that particular place, and in doing so it became a contract right which we could not be deprived of by any action of the Council.

Mr. RANDALL: This is only carrying out the idea that
40 was set forth in the petition denying them the right to locate the switch there; it will turn out in this case that it makes no difference whether the plans and specifications provided that they could put the switch there. I would like to have this matter in evidence and present it in our brief, and I think I can show to your Honor wherein it is wholly competent.

The COURT: I will let it go in the record subject to their objection.

Testimony was admitted subject to the objection.

Appellant then moved to strike out the testimony of the witnesses upon the same grounds that it was objected to and also because the testimony does not tend to prove the construction of the contract, which motion to strike out was overruled by the court and appellant excepted.

In the beginning of the trial it was stipulated and agreed that exception should be saved to all rulings of the court. Appellee again rested. Appellant then introduced the following testimony.

JOHN W. BREYFOGLE testified:

Q. Mr. Breyfogle, I will ask you to state to the Court whether or not you remember being before the City Council of the City of Olathe, at any time with Mr. Riley, the manager of the Missouri and Kansas Interurban Railway Company when he made a statement to the Council with reference to the $12,000 in controversy here?

A. Yes, sir.

Q. Do you remember, Mr. Breyfogle, the substance or about what that statement was?

A. Yes, sir.

Q. Well, you may state to the Court, as you remember it?

A. Mr. Riley stated to the Mayor and City Council that he was very anxious to have the litigations between the electric line and the City settled, and that he was authorized, as I recall it, by Mr. Strang to make an offer of a bond to secure the payment of
41 the $12,000.00 in controversy within one year, provided the existing litigation would be dismissed and the matter thus compromised; there was a great deal said there: I would not undertake to say all that was said, but I think we probably covered all the grounds of the controversy that night, which occupied a great deal of time, but it was an effort on the part of Mr. Riley and myself representing the Strang Line to get rid of the litigation by this compromise. I think Mr. Riley made some reference to the road not being completed, on account of some certain switch not being put in or something of that kind, but that was something that came up in the conversations it seems to me, and everything that had ever been talked about was brought up that night, and the general conversation between Mr. Riley and the City Attorney and some of the Councilmen, mostly between Mr. Riley and the City Attorney, as I recall it, it was between them.

Q. Was there anything said about moving the switch on Park street up to the east end?

A. Yes.

Q. Well, what if anything was said about that, if you remember?

A. In this conversation it was stated by some member of the Council or the City Attorney that there was a great deal of objection to the switch being located where Mr. Riley had placed it, and my recollection is it was suggested, either by the same member of the Council, or approved by him, that the switch might be located somewhere up there about at Adair store, or between there and the railroad crossing; that that might be done; that had nothing to do with the agreement or the matter there that night, except that it was brought up incidentally by questions asked by the different Councilmen.

Q. Was there anything said about this $12,000 when it was due, or whether it was due?

A. Oh, yes, I recall the City Attorney and some Councilmen, they stated it was due and had been due for a long time, and Mr. Riley claimed that he had not been allowed to finish his
42 work, and that it was not due, but still that he was not any attorney and was not up there for any purpose of discussing those matters, but that he came up there for the purpose of them getting together and settling the litigation that was injuring the City and injuring the road.

Q. Wanted to compromise that matter?

A. Yes, sir.

POOR

THOMAS RILEY testified as follows: That he was General Manager of Appellant, that while the road was being constructed a quo warranto suit was begun against appellant and work was delayed about 30 days by reason of said suit. He said he appeared before the City Council of the City of Olathe, and that he offered to furnish a surety company bond to replace the personal bond, while a settlement was being made and to stop all litigation and prevent future litigation, and that the question of the switch on Park street was brought up and it was suggested by the Council, that the switch be removed to a point on Park street between Adair's store and the Frisco railroad track; that when the question was raised by the City Attorney that the money was past due, that he, witness, stated he did not know anything about that, he was not an attorney.

C. V. TOWNLEY and J. M. GRIM were again recalled by appellee and testified they did not hear anything said about removing the switch on Park street.

And the above was all the evidence introduced by either party touching the questions raised in this Court.

This case and the case of The City of Olathe vs. F. R. Ogg, et al., No. 17248, were tried together in the District Court and it is agreed that both cases may be heard in this court at the same time and upon the abstract and briefs in this case.

I, the undersigned one of the attorneys for appellant named in the foregoing abstract, do hereby certify that the foregoing is a true abstract of the record in the action therein named, and also in case No. 17248.

S. D. SCOTT.

43 *Specification of Errors.*

1.

The court erred in overruling the demurrer of appellant to the evidence of appellee.

2.

The court erred in finding for the appellee and against the appellant, upon the evidence introduced.

3.

The court erred in its conclusions of law.

4.

The court erred in admitting in evidence the resolution of the City Council of the City of Olathe set out on pages 23 and 24, over the objection of appellant.

COPY

5.

The court erred in finding against appellant because the action of appellee in setting aside the approval of the plans and specifications of appellant, was in violation of Article one, Section ten, of the Constitution of the United States.

6.

The court erred in finding for the appellee, because the action of the City Council of Olathe was in violation of Article 14, Section 1, of the Constitution of the United States.

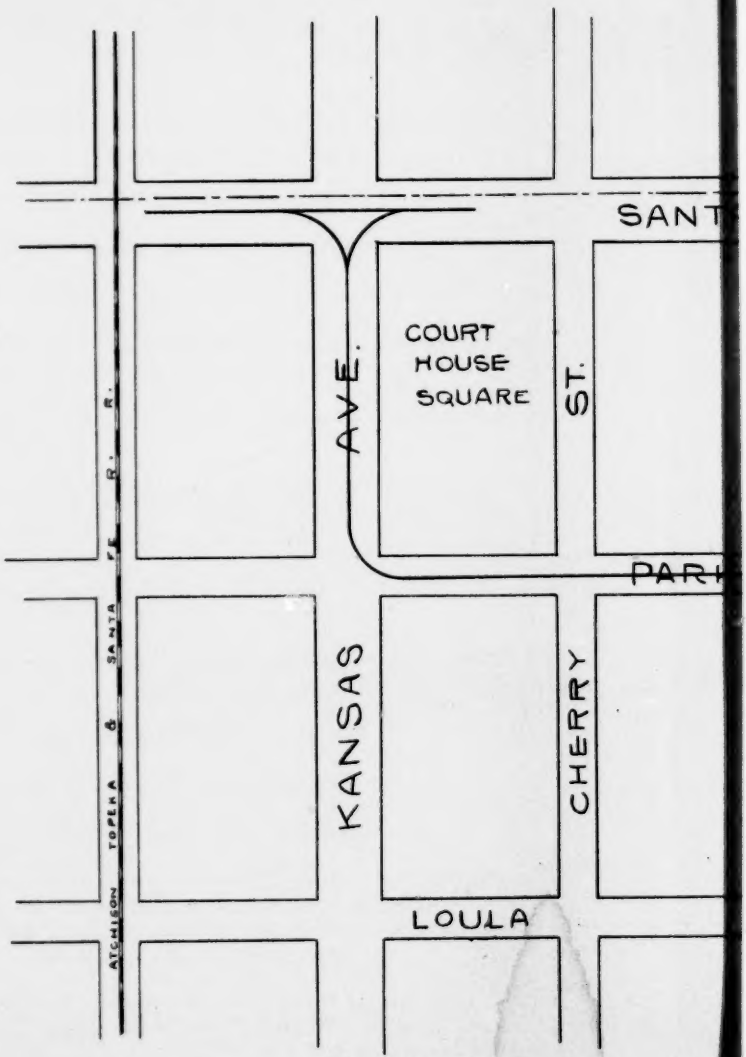
7.

The court erred in overruling motion of appellant for a new trial.

This page is inserted here for the reason that I overlooked rule 9 until after the abstract was printed.

S. D. SCOTT.

(Here follows map marked p. 44.)



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SANTA FE AVE.
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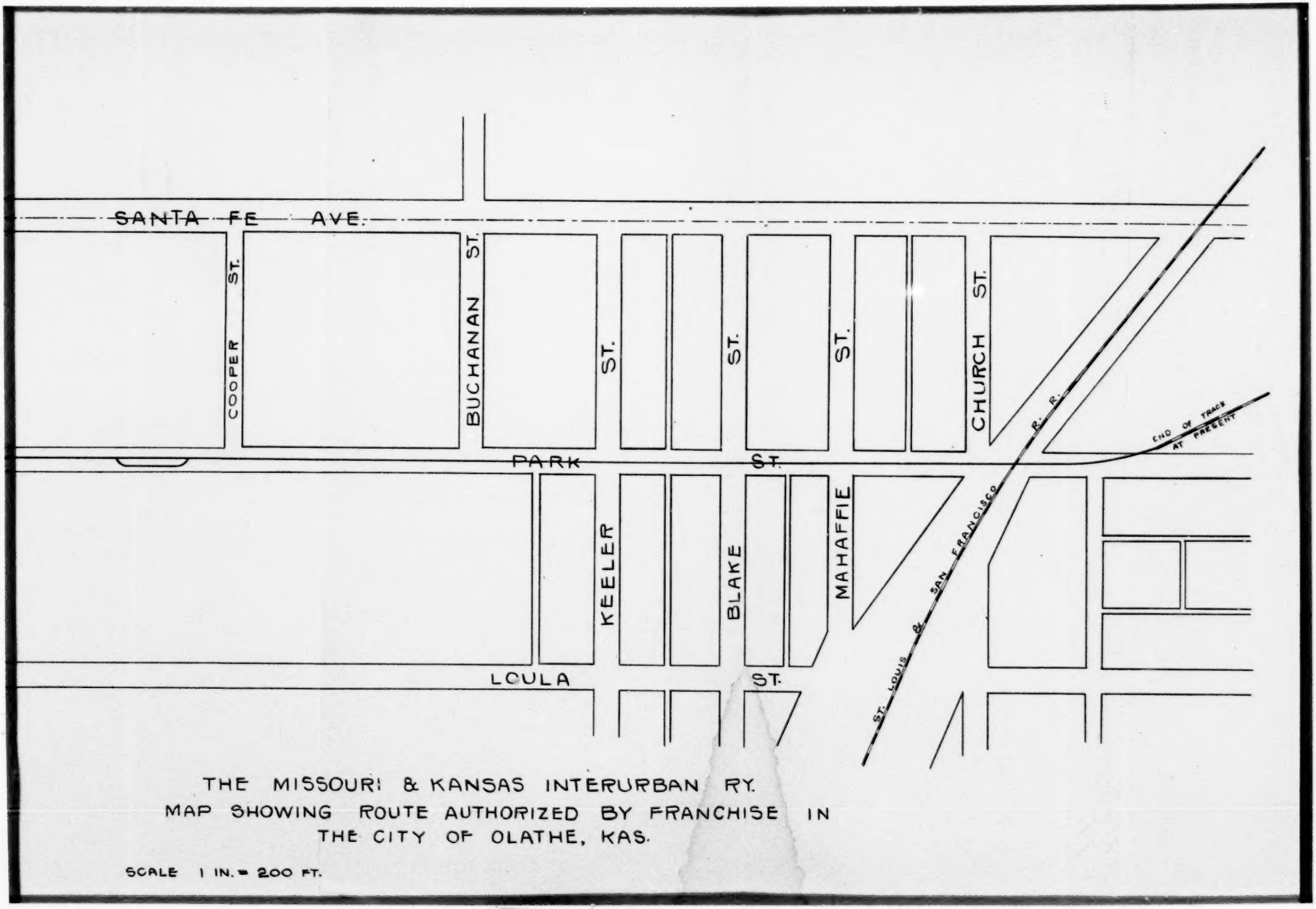

THE MISSOURI & KANSAS INTERURBAN RY.
MAP SHOWING ROUTE AUTHORIZED BY FRANCHISE IN
THE CITY OF OLATHE, KAS.

SCALE 1 IN. = 200 FT.

POOR COPY

POOR

45 Be it remembered, that on the 6th day of February 1911 the same being one of the regular judicial days of the January Term, 1911, of the supreme court of the state of Kansas, before said court in session at the supreme court room in the city of Topeka, the following proceeding, among others, was had and entered of record as follows, to-wit:

46 In the Supreme Court of the State of Kansas, Monday, February 6, 1911.

No. 17247.

THE CITY OF OLATHE, Appellee,
vs.
J. A. EDSON, Rec., etc., Appellants.

This cause comes on to be heard on the notices of appeal, transcript of the judgment and abstract of the record of the district court of Johnson County; and thereupon said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

47 Be it remembered, that on the 11th day of March 1911 the same being one of the regular judicial days of the January Term, 1911, of the supreme court of the state of Kansas, before said court in session at the supreme court room in the city of Topeka, the following proceeding, among others, was had and entered of record as follows, to-wit:

48 In the Supreme Court of the State of Kansas, Sat., March 11, 1911.

No. 17,247.

THE CITY OF OLATHE, Appellee,
vs.
J. A. EDSON, Rec., etc., Appellants.

This cause comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellants pay the costs of this case in this court taxed at $—, and hereof let execution issue.

49 Be it further remembered, that, to-wit on the 11th day of March A. D. 1911 there was filed in the office of the clerk of the supreme court of the state of Kansas, the syllabus & opinion of the Court which, with the indorsements thereon are in the words and figures as follows, to-wit:

OR COPY

50 No. 17247.

THE CITY OF OLATHE, Appellee,
v.
J. A. EDSON, Receiver, etc., Appellants.

Appeal from Johnson County.

Affirmed.

Syllabus by the Court.

MASON, *J.:*

An interurban railway company, in consideration of a franchise to use the streets of the city, agreed to pay a fixed sum upon the completion of the work to be done thereunder. In an action by the city to recover the amount the company contended that the payment was not due because the city had by a temporary injunction prevented the construction of a sidetrack included in specifications which had been submitted and approved in accordance with a provision of the ordinance granting the franchise. Held, that the rightfulness of the injunction need not be determined in this action; and that notwithstanding the construction of the sidetrack has so far been prevented by the city, there has been such a substantial compliance of the work to be done under the franchise as to render the consideration payable.

All the justices concurring.

A true copy.
Attest:

____ ____,
Clerk Supreme Court.

51 No. 17247.

The opinion of the court was delivered by

MASON, *J.:*

By ordinance passed January 28, 1907, the Missouri & Kansas Interurban Railway Company was granted a franchise to occupy certain portions of the streets of the city of Olathe, in consideration of which it agreed to pay $9,000. In October, 1908, the city brought action for that sum. It recovered a judgment from which the company appeals. The question presented is whether the payment had become due.

The ordinance contained these provisions, among others:

"The location of the tracks, turnouts, Y's, passing tracks and power house and all poles and wires shall be subject to the approval of the City Council. * * * All the work and improvements of the said railway company of said city shall be constructed under the supervision of the Mayor and the City Council. * * * Before doing

any work of construction in said City of Olathe the grantee shall file with the City Clerk plans and specifications of said work to be approved by the City Council."

On February 4, 1907, the company filed specifications of the work to be done under the franchise, making reference to an accompanying plat which showed a "turn out" or passing track not otherwise referred to. These specifications were approved by the city council on the same date. With the exception of this turn out, the work was completed according to the specifications some time in August, 1907, and since that time the road has been in actual operation over the full length of the line. On August 28, 1907, the city began an action against the company to enjoin the construction of the turn out in question, and procured a temporary injunction which is still in force, no final judgment having yet been rendered. On March 21, 1019, the city council adopted a resolution undertaking to set aside the approval of the specifications so far as they related to the turn out.

In brief the question involved is whether the work to be done by the company under the franchise can be regarded as having been completed, in such sense as to make the payment of the $9,000 due,
52 in view of the fact that the city has prevented the construction of the turn out. The company maintains that upon the acceptance of its specifications it acquired a contract right to build the turn out, which can not be affected by any subsequent action of the city. The city contends that it can not by contract divest itself of the power to control the use of the streets for the benefit of the public, and that the turn out if constructed at the point designated would unreasonably interfere with the use of the street as a highway. These matters need not be determined in this case. They are proper subjects for consideration in the injunction suit. In whatever way they may be determined we think the judgment here appealed from must be affirmed upon the ground that the work of the company authorized by the franchise has long since been substantially completed. The location of the turn out is a mere detail. The right of the company to construct it at the place selected can be determined in the injunction action. A final judgment for the city in that proceeding will demonstrate that the stopping of work on the turn out was rightful and therefore could not be a just ground for the company's refusing to make the promised payment. If on the other hand it develops that the injunction was wrongfully issued the company's remedy for any consequent injury lies in seeking damages therefor, not in delaying payment of the amount agreed upon as the consideration for the granting of the franchise.

The Judgment is affirmed.

All the justices concurring.

A true copy.

Attest:

Clerk Supreme Court.

53 Be it further remembered, that afterwards, to-wit on the 30th day of March A. D. 1911 there was filed in the office of the clerk of the supreme court of the state of Kansas, a petition for a rehearing which, with the indorsement thereon are in the words and figures as follows, to-wit:

54 Filed Mar. 30, 1911. D. A. Valentine, Clerk Supreme Court.

17247, 17248.

Mason.

In the Supreme Court, State of Kansas.

No. 17247.

THE CITY OF OLATHE, Appellee,
vs.
J. A. EDSON, Receiver of the Missouri & Kansas Interurban Railway Company, Revived in the Name of the Missouri & Kansas Interurban Railway Company, Appellant.

Petition for Rehearing.

A. F. Hunt, Jr., A. M. Harvey, Frank Doster, J. E. Addington, Attorneys for Appellant.

55 In the Supreme Court, State of Kansas.

No. 17,247.

THE CITY OF OLATHE, Appellee,
vs.
J. A. EDSON, Receiver of the Missouri & Kansas Interurban Railway Company, Revived in the Name of the Missouri & Kansas Interurban Railway Company, Appellant.

Petition for Rehearing.

The appellant respectfully petitions the court to grant a rehearing in this cause, on account of certain facts shown by the record and certain rules of law applicable to the facts in this cause, all of which, as would be indicated by the opinion of the court, have been overlooked, and are as follows:

I.

It would seem that the court has overlooked the importance of the "turn-out" or side-track which was a part of the road contracted to

be built, and the construction of which was prevented by the
56 appellee. In the opinion it is asserted that the location of the "turn-out" was a mere detail. This statement is no doubt true, and so likewise is the location of the main track, but the appellee considered these details of sufficient importance that they were required to be embodied in a plan which on being approved by the appellee became a part of the contract. This plan as shown in the abstract has not been questioned as to its correctness, and we submit that any intelligent man by an examination of it will understand that it called for the construction of this side-track; and that it be constructed at the very place indicated. If the location is the "mere detail," then it still appears that this part of the system has not been constructed at any place, and that its construction was prevented by the appellee. The finding of the trial court that the construction of this side-track was not necessary to the completion of the work as contemplated in sections 20 and 21 of the ordinance, is remarkable in view of the fact that the only testimony offered by either side tending to show the importance of this side-track or the relation it bore so far as usefulness was concerned to the entire system, was the testimony of Mr. Riley (page 14 of the abstract), to the effect that the turn-out was a necessary part of the work.

Appellee attempted to show by a so-called expert that the red
57 line upon this plan indicating the side-track might be a slip of the pen or some inadvertent mark, but the further testimony offered by the city, showing that the city officers knew what it meant and the appearance of the plan itself, totally disprove this ridiculous contention. The simple fact gathered from all of the evidence seems to be that the city did contract with the Railway Company, by which contract it agreed that the company might build this side-track, and that as a mere whim and without any cause being shown therefor refused to allow it to be built. It would seem that the trial court had more reason for inquiring into conditions that caused the city to refuse the construction of this track than it had to make a finding as to whether the track was necessary, without any evidence to support such finding. There was no testimony whatever introduced showing or tending to show that there was any special or general conditions concerning the use of the street that made it necessary for the city to prevent the building of this side-track. In this connection it will be noticed that the city compelled the abandonment of the work on this side-track in August, 1907, and that the resolution reconsidering their approval of the plans and specifications by which this side-track was to be built was

not adopted until the 21st of March, 1910. This resolution
58 contains the only suggestion found anywhere in the record of the ground upon which the approval of the original plans and specifications were set aside.

Bearing upon the facts here recited, we again respectfully call the court's attention to the rule of law laid down in authorities cited in brief of appellant, to the effect that where conditions precedent are set forth in specifications, then those conditions must be met in exact accordance with the specifications. See authorities cited, commencing at page 7 of brief of appellant.

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II.

The complete omission of any reference to the Federal constitutional question in the opinion filed by the court would indicate that this question has been overlooked.

Here was a complete and definite contract made between the Railway Company and the City, which contract consisted of (*a*) the original ordinance granting the franchise, (*b*) its acceptance by the Company, (*c*) the plans and specifications filed in accordance therewith, and (*d*) the approval of these plans and specifications by the proper officers of the city.

This kind of a contract cannot be treated lightly. The rights of the Company must be inviolate under it, not only on account of the direct property interests of the Company therein, but on ac-
59 count of the many personal property interests of those owning the capital stock and the bonds of the Company; and, on the other hand, the rights of the City under the contract are to be respected and protected purely and simply as contract rights.

Under this contract the Railway Company proceeded in good faith on its part and expended large sums of money in the performance of its contract obligations, and while in the act of building a portion of the track which it had contracted to build, and which the City had contracted that it should build, one of the contracting parties, to wit, the City, which now claims the benefits of the contract, absolutely impaired the rights of the Railway Company under the contract by refusing to allow it to be executed.

At the time this action was brought, and for months after the issues therein were made up, there was nothing to show why the City on its part refused to permit the contract to be executed; but finally, and on the 21st day of March, 1910, the City, by legislative enactment in the form of a resolution adopted by its mayor and council, invaded the rights of appellant under the contract and impaired the contract by setting aside the City's approval of the plans and specifications, which more than three years before had been given. In the opinion the court does not choose to treat
60 this resolution as a nullity, and, in fact, if it is to be treated as a nullity, then the record shows that without any cause and without any deliberate action the City has refused to permit the work to be completed as contemplated in sections 20 and 21 of the original ordinance.

When proof was offered of the adoption of this resolution, appellant objected for the reason, among others, that it was legislation impairing the obligation of a contract, and this objection to testimony was urged upon the trial court on the presenting of the motion for a new trial.

On presenting its specifications of errors in this court, appellant, in specifications numbered 5 and 6, has expressly claimed, and by this petition expressly claims, the benefit and protection of the Constitution of the United States, and especially of the provisions of Section 10 of Article 1 thereof, and of Section 1 of Article 14 thereof.

That portion of Section 10 of Article 1 of the Constitution of the United States, the benefit of which is expressly claimed by appellant, is the clause providing that no State shall pass any law impairing the obligation of contracts; and that portion of Section 1 of Article 14 of the Constitution of the United States the protection of which appellant expressly claims is that portion providing that no
61 State shall deprive any person of property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. The appellant earnestly urges upon the court that the enactment of the said resolution under date of March 21st, 1910, by the mayor and council of the appellee, positively violated each of these provisions of the Constitution of the United States, and impaired the obligation of the contract between the Railway Company and the City, and at the same time deprived the Railway Company of its property without due process of law, and deprived it of the equal protection of the laws.

In this behalf the court's attention is respectfully called to the many and abundant authorities cited in the brief of appellant, commencing upon page 11 thereof.

Conclusion.

The relief pointed out in the opinion in this case for the appellant is hardly consistent with another decision of this Honorable Court, which decision materially affected this appellant. In the opinion in this case it is suggested that "if, on the other hand, it "develops that the injunction was wrongfully issued, the Company's "remedy for any consequent injury lies in seeking damages therefor."

In another case, and when this same city had damaged this
62 appellant to a serious extent by a legislative enactment intended to deprive appellant of its rights under a similar contract, this court held that the city was not liable for damages: Edson, Receiver, v. City of Olathe, 81 Kan. 328, and 82 Kan. 4. In the case just cited the court holds that damages cannot be recovered, because the mayor and council acted in their legislative capacity in the repealing of a certain ordinance. It is submitted in the present case that, to be consistent with the former decision of this court, the only theory upon which the resolution of the city council can be sustained, or could have been admitted as evidence in this case, is that it was legislation within the proper sphere of the police power of the city, and it is apparent that the allowance of a recovery to the city must necessarily involve such finding as well as a determination that the Contitutional rights of the appellant have not been invaded. Are we to understand that the court now holds that the mayor and council did not act in a legislative capacity when they passed a resolution setting aside their approval of a portion of the plans and specifications which were a part of their contract with the Railway Company?

This petition for a rehearing is submitted not only in this cause, but in the cause entitled The City of Olathe, Appellee, v. F. R. Ogg, et al., Appellants, and number 17,248, in this court, which

COPY

63 cause has been consolidated and tried jointly with the cause herein in the District Court and in this court by stipulation of counsel, as it appears in the record.

Respectfully,

A. F. HUNT, JR.,
A. M. HARVEY,
FRANK DOSTER,
J. E. ADDINGTON,
Attorneys for Appellant.

64 Be it remembered, that on the 14th day of April, 1911, the same being one of the regular judicial days of the January Term 1911, of the supreme court of the state of Kansas, before said court in session at the supreme court room in the city of Topeka, the following proceeding, among others, was had and entered of record as follows, to-wit:

65 In the Supreme Court of the State of Kansas, Friday, April 14, 1911.

No. 17247.

CITY OF OLATHE, Appellee,
vs.
J. A. EDSON, Rec., etc., et al., Appellants.

Now comes on for decision the petition for a rehearing of this cause; and thereupon it is ordered that said petition for a rehearing be denied.

66 *Authentification of Record.*

SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of the Missouri and Kansas Interurban Railway Company, plaintiff, vs. the City of Olath, defendant, and also of the opinions of the court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in Topeka, Kansas, this 2" day of May 1911.

[SEAL.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

67 Here follows, original petition for writ of error, and allowance of the same, the assignments of error, the writ of error, the citation and proof of service thereof, and a copy of the Bond for appeal.

POOR

68 In the Supreme Court of the State of Kansas.

No. 17247.

THE MISSOURI AND KANSAS INTERURBAN RAILWAY COMPANY, Plaintiffs in Error,
vs.
THE CITY OF OLATHE, Defendant in Error.

Petition for Writ of Error.

Considering themselves aggrieved by the final decision of the Supreme Court in rendering judgment against them in the above entitled cause, the plaintiffs in error hereby pray a Writ of Error from said decision and judgment to the United States Supreme Court, and an order fixing the amount of a bond for costs.

Assignments of Error herewith.

FRANK DOSTER,
A. F. HUNT, JR.,
HARVEY & ADDINGTON,
Attorneys for Plaintiffs in Error.

STATE OF KANSAS,
Supreme Court, ss:

Let the Writ of Error issue upon the execution of a bond by The Plaintiffs in error above named, The Missouri and Kansas Interurban Railway Company, in the sum of $2,200.00 Dollars.

Dated April 15, 1911.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

69 In the Supreme Court of the State of Kansas, Saturday, April 15, 1911.

Before Johnston, C. J., at Chambers.

No. 17247.

CITY OF OLATHE, Appellee,
vs.
J. A. EDSON, Rec., etc., Appellant.

A petition for a writ of error now being presented it is ordered that said petition be allowed, and that the writ of error issue upon the execution of a bond by the appellant to the appellee in the sum of $2,200.00 to be approved by this Court or one of the justices thereof; said bond given as a supersedeas.

70 In the Supreme Court of the State of Kansas.

No. 17248.

THE MISSOURI AND KANSAS INTERURBAN RAILWAY COMPANY, Plaintiff in Error,
vs.
THE CITY OF OLATHE, Defendant in Error.

Assignment of Errors.

Now comes the above named plaintiffs and file herewith their petition for a Writ of Error, and say that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court make the following assignments of error:

The Supreme Court of Kansas erred in affirming the rulings and judgment of the District Court of Johnson County, in said state, in the reception of evidence on the trial of said cause, and in rendering judgment in said cause, in that there was drawn in question on the issues of law raised by the introduction of said evidence and the rendition of said judgment, and especially claimed by the said The Missouri and Kansas Interurban Railway Company a right, title or privilege under the Constitution of the United States, and the decisions of said Supreme Court of Kansas was against said right, title or privilege so claimed.

The said errors are more particularly set forth as follows:

The Supreme Court of Kansas erred:

First. The said Supreme Court of Kansas erred in affirming the rulings and judgment of the said District Court of Johnson County, Kansas, receiving in evidence over the object of plaintiffs in
71 error the resolution of the City Council of the City of Olathe, Kansas, revoking and vacating its approval of the plans and specifications of the track and line of road in said city which it had previously given, and on the faith of which it, the said Railway Company, had entered on the work of constructing its line of road; because the approval of said plans and specifications and the work done in pursuance thereto constituted a contract between said City of Olathe and said Railway Company, and the said resolution of revocation and vacation constituted an impairment of the obligations of said contract and a deprivation of said Railway Company of its property without due process of law.

Second. The said Supreme Court of Kansas erred in affirming the judgment of the said District Court of Johnson County, Kansas, which said judgment was in denial of said Railway Company's claim that the approval by the City Council of the City of Olathe of the plans and specifications of said Railway Company's line of road and track constituted a contract between said company and said city, which cannot be impaired by any action of said city, and that the subsequent revocation and vacation of said approval con-

stituted an impairment of the obligations of said contract and a deprivation of said Railway Company's property without due process of law.

For which errors the plaintiffs in error, pray that the said judgment of the Supreme Court of the state of Kansas dated the 11th day of March, 1911, be reversed and a judgment rendered in favor of the plaintiffs in error and for costs.

FRANK DOSTER,
A. F. HUNT, JR., &
HARVEY & ADDINGTON,
Attorneys for Plaintiffs in Error.

72 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between The Missouri and Kansas Interurban Railway Company, William B. Strang, F. R. Ogg, J. C. Keepers, J. H. Cosgrove, and George H. Hodges, and The City of Olathe, Kansas, wherein was drawn in question the validity of an authority exercised under, the United States, and the decision was against its validity; and wherein was drawn in question the validity of an authority exercised under, said state, on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of its validity; or wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution; a manifest error hath happened, to the great damage of the said plaintiffs in error, The Missouri and Kansas Interurban Railway Company, a corporation, William B. Strang, F. R. Ogg, J. C. Keepers, J. H. Cosgrove, and George H. Hodges, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid,

73 with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness The Honorable Edward D. White, Chief Justice of the

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United States, the 19 day of April, in the year of our Lord one thousand nine hundred and eleven.

[SEAL.] GEO. F. SHARRITT,
Clerk Circuit Court United States, District of Kansas.

Allowed:
W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

74 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of Olathe, Kansas, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the state of Kansas, wherein The Missouri and Kansas Interurban Railway Company, a corporation, William B. Strang, F. R. Ogg, J. C. Keepers, J. H. Cosgrove, and George H. Hodges, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Chief Justice of the Supreme Court of the state of Kansas, this 15 day of April, 1911.

[SEAL.] W. A. JOHNSTON.
Chief Justice Supreme Court of Kansas.

Attest:
D. A. VALENTINE,
Clerk Supreme Court of Kansas.

OLATHE, KANSAS, *April* 19, 1911.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

____ ____,
Attorney for the City of Olathe, Kansas.

75 *United States Marshal's Return.*

Received this writ at Topeka, April 22, 1911 and served the same upon the within named, The City of Olathe, Kansas, by delivering to C. W. Gorsuch, Mayor, a true and certified copy of this writ with all endorsements thereon, at Olathe, Kansas, on the 24th day of April, 1911.

WM. H. MACKEY, JR.,
United States Marshal, District of Kansas.
By B. F. F.,
Chief Office Deputy.

5.90 in 17247.

76 In the Supreme Court of the State of Kansas.

No. 17247.

THE MISSOURI AND KANSAS INTERURBAN RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE CITY OF OLATHE, Defendant in Error.

Bond No. 5865.

Bond on Writ of Error.

Know all men by these presents, That we, The Missouri and Kansas Interurban Railway Company, as principal, and The State Surety Co. of Kansas City, Mo., as surety, are held and firmly bound unto The City of Olathe, Kansas, in the sum of 22,000.00 Dollars, to be paid to the said City, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives, assigns, firmly by these presents.

Sealed with our seals and dated this 17th day of April, 1911.

Whereas, The above named Plaintiffs in Error, The Missouri and Kansas Interurban Railway Company, William B. Strang, F. R. Ogg, J. C. Keepers, J. H. Cosgrove, and George H. Hodges, have sued out a writ of errors to the Supreme Court of the United States, to reverse the judgment in the above entitled action by the Supreme Court of the state of Kansas.

Now, therefore, The condition of this obligation is such that if the above named plaintiffs in error shall prosecute said writ to effect and answer all costs and damages, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE MISSOURI AND KANSAS INTERURBAN RAILWAY COMPANY,
By W. B. STRANG, *President.*
[SEAL.] GLOBE SURETY COMPANY OF KANSAS CITY, MO.,
By J. L. MILLER, JR., *Vice-President.*

Attest:
WM. LETTLER,
Secretary.

Attest:
H. P. FORES,
Assistant Secretary.

Approved April 19, 1911.
W. A. JOHNSTON,
Chief Justice.

Filed Apr. 19, 1911.
D. A. VALENTINE,
Clerk Sup. Ct.

77 SUPREME COURT, STATE OF KANSAS, *ss:*

I, D. A. Valentine, Clerk of the said Court, do hereby certify that there was lodged with me as such clerk on April 19th, 1911, in the matter of The Missouri and Kansas Interurban Railway Company a corporation, versus The City of Olathe, Kansas.

1. The original bond of which a copy *os* herein set forth.

2. Two copies of the Writ of Error, as herein set forth,—one for the defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand an- affixed the seal of said Court at my office in Topeka, Kansas, this 2nd day of May 1911.

[SEAL.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

78 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto subscribed my name, and affixed the seal of said Supreme Court of Kansas, in the City of Topeka, this 2" day of May, 1911.

[SEAL.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

Plaintiff's costs, $—, paid by the Missouri and Kansas Interurban Railway Company.

Defendant's costs, $—, paid by —— ——.

Costs of transcript, $—, paid by The Missouri and Kansas Interurban Railway Company.

—— ——,
Clerk Supreme Court of Kansas.

79 In the Supreme Court of the State of Kansas.

I, D. A. Valentine, clerk of the supreme court of the state of Kansas do hereby certify that the above and foregoing is a full true and correct duplicate and reproduction of the transcript of the record in the within entitled case as the same appeared when fully prepared and transmitted to the clerk of the supreme court of the United States; I do further certify that the above and foregoing is a full true and correct transcript of all the papers filed and all proceedings had in the within entitled case including the papers and pleadings relating to the suing out of a writ of error.

Witness my hand and the seal of the supreme court hereto affixed, at my office in Topeka, this 11th day of July A. D. 1911.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of the State of Kansas.

80 In the Supreme Court of the United States.

No. 17247.

THE MISSOURI & KANSAS INTERURBAN RAILWAY COMPANY, Plaintiff in Error,

vs.

THE CITY OF OLATHE, Defendant in Error.

Affidavit.

STATE OF KANSAS,
Shawnee County, ss:

Frank Doster on oath says, he is one of the attorneys for the Missouri and Kansas Interurban Railway Company, plaintiff in error in the above entitled cause; that about May 8th, 1911, he forwarded to the Clerk of the Supreme Court of the United States at Washington, D. C., by Wells-Fargo Express a record of the above entitled cause as the same appears of record and on file in the office of the Clerk of the Supreme Court of Kansas, together with a petition for writ of error, assignment of errors, writ of error to the Supreme Court of Kansas, citation to defendant in error with United States Marshal's return of service thereon, and supersedeas bond for the purpose of having the same filed in the office of the said Clerk of the United States Supreme Court; that he took from the agent of said Wells-Fargo Express Company at Topeka, Kansas, a receipt for the package containing said record and papers; that he is informed by the agent of said Wells-Fargo Express Company at Topeka, Kansas, that said package was delivered in transit by his company to the United States Express Company at Kansas City, Missouri, and
81 that agents of said United States Express Company have stated to him, the said agent at Topeka, Kansas, their inability to deliver said package, stating in writing as follows: "No "doubt this package was destroyed in fire near Chicago on B. & O. "train No. 46, May 10th, 1911."

Affiant verily believes that said original record and papers forwarded as aforestated have been lost or destroyed and that the same cannot be filed as intended.

FRANK DOSTER, *Affiant.*

Subscribed and sworn to before me this 13th day of July, 1911.

[Seal J. Newell Abrahams, Notary Public, Shawnee Co., Kans.]

J. NEWELL ABRAHAMS,
Notary Public.

My Commission Expires July 7, 1912.

82 [Endorsed:] No. 17247. In the Supreme Court of the United States. Missouri & Kansas Interurban Railway Company, *Defendant* in Error, vs. The City of Olathe, Defendant in Error. Affidavit.

Endorsed on cover: File No. 22,803. Kansas Supreme Court. Term No. 727. The Missouri & Kansas Interurban Railway Company, William B. Strang, F. R. Ogg, et al., plaintiffs in error, vs. The City of Olathe, Kansas. Filed July 17th, 1911. File No. 22,803.

In the

Supreme Court of the United States

October Term, 1911.

No. 727.

THE MISSOURI & KANSAS INTERURBAN RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE CITY OF OLATHE, KANSAS,
Defendant in Error.

No. 728.

THE MISSOURI & KANSAS INTERURBAN RAILWAY COMPANY, a Corporation, WILLIAM B. STRANG, F. R. OGG, J. C. KEEPERS, J. H. COSGROVE and GEORGE H. HODGES,
Plaintiffs in Error,
vs.
THE CITY OF OLATHE, KANSAS,
Defendant in Error.

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR ON MOTION TO DISMISS.

The statement of facts contained in the motion to dismiss is substantially correct in outline. However, it will be of help to more specifically indicate the points both of fact and law, on which the decision of the State Supreme Court was made.

The City sued the company on its bond to pay certain money which, by agreement inserted in the company's franchise grant from the City, was made due and payable on the completion of the street railroad. The company defended on the ground that the line of road had not been completed; that the plans and specifications for the line, approved by the City, called for a side-track or turnout at a certain point; that the making of this side-track or turnout had been enjoined by court action by the City; that the City having thus prevented the completion of the road, the money agreed to be paid was not due.

Thus far, of course, no federal question had arisen; but the record (23-24) then shows that on the trial of the case, the City, in defense to the company's claim of immaturity of the debt and in assertion of its right to enforce present payment, offered in evidence the resolution of the city council revoking its former approval of the plans and specifications "for the construction of side-track, or turnout, on Park street." To this offer of evidence, the company, among other reasons, objected (Record 25), that "they (the city council) have approved our plans and specifications and our right to build there, in which we have shown in evidence that we obtained the special irons, switches, 'Y's' and frogs necessary to put that switch in at that point, and with the approval of the council, put it at that particular place, and in doing so, it became a contract right which we could not be deprived of by any action of the council." This objection was carried into the specifications of error in the State Supreme Court (Record 28) in the following language:

"The court erred in finding against appellant, because the action of appellee in setting aside the approval of the plans and specifications of appellant was in violation of Article 1, Section 10, of the Constitution of the United States."

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Federal questions arise on objections to the reception of evidence specifically setting forth the federal right claimed.

Brooks v. *Missouri*, 124 U. S. 394.
California National Bank v. *Kennedy*, 167 U. S. 362.

It is important now to observe the manner of disposition of the case-made by the State Supreme Court. The Court said (Record 31):

> "In brief, the question involved is whether the work to be done by the company under the franchise can be regarded as having been completed in such sense as to make the payment of the $9,000 due, in view of the fact that the City has prevented the construction of the turnout. The company maintains that upon the acceptance of its specifications it acquired a contract right to build the turnout, which cannot be affected by any subsequent action of the City. The City contends that it cannot by contract divest itself of the power to control the use of the streets for the benefit of the public, and that the turnout, if constructed at the point designated, would unreasonably interfere with the use of the street as a highway. These matters need not be determined in this case. They are proper subjects for consideration in the injunction suit. In whatever way they may be determined, we think the judgment here appealed from must be affirmed, upon the ground that the work of the company authorized by the franchise has long since been substantially completed. The location of the turnout is a mere detail."

This excerpt from the opinion shows that the company contended it had a contract, the obligation of which the City had impaired by the abrogation of a part of the ordinance franchise, and it also shows that the City, without denying that its action had the effect to rescind the contract *pro tanto*, defended on the ground that such rescission was in the exercise of a police power it had not, and could not, surrender. There was, therefore, as thus admitted, for determination on the one hand

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the company's contention of impaired contract and on the other hand the City's contention of right to impair it in virtue of its police authority. The court avoided a decision of the question by holding that the building of the turnout at the agreed place was not a matter of substance in the contract, or, stated in another way, that the building of the line without the turnout was a substantial completion of the contract, and, hence, the denial of the right to build it there or build it at all was not an impairment of the contract obligation.

It will be observed that the money sued for and recovered by the City was bonus money promised by the company as a consideration for the franchise to complete its line according to certain proffered and approved plans and specifications, and not to be paid until completion according to such plans and specifications. The company's obligation to pay this money was conditional on the adhesion by the City to the terms of the contract allowing the line to be constructed as agreed. This condition therefore constituted an essential ingredient of the contract, and was the only condition precedent to the payment of the money. The record shows that the City admitted and that the State Court admitted that the road had not been completed as the City agreed it might be completed, and that the reason it had not been completed was because the City had prevented its completion by abrogating a portion of the franchise contract, and the institution of an action to carry out the purpose of its resolution of abrogation, and the record also shows that the refusal to allow the completion of the contract was solely because (as the City claimed and the court decided) the uncompleted portion constituted an unsubstantial detail of the engagement.

We submit that the contract right to construct the turnout at the agreed place, and the abrogation of that contract by the City, raises a federal question which cannot be avoided by saying that the location of the turnout at the desired and

approved place was an unsubstantial portion of the right the company had contracted for; and we further submit that if it shall finally appear that the location of the turnout at the agreed place is such an unsubstantial detail of the contract that the obligation of the engagement cannot be said to have been impaired by its rescission, that the question whether it is such unsubstantial detail is itself a federal question. It is not allowed to a State Court to defeat a claim of federal jurisdiction in a case of claimed impairment of contract by applying the rule *de minimis* to the injury. A decision that a contract has been impaired, but in such an unimportant particular as not to give ground for complaint, is the decision of a federal question on which the complaining party has the right to invoke the judgment of the federal tribunal. So, therefore, inasmuch as the Court on this motion to dismiss cannot examine the record to determine whether the impairment of the contract by the City was in an unsubstantial particular, the case should be retained that we may point out wherein the substantial obligation of the contract has been repudiated.

> "It is part of the duty of the federal courts, under the impairment of obligation of contract clause in the Constitution, to decide whether there be a valid contract and what its construction is, and whether, as construed, there is any subsequent legislation, by municipality or by the State Legislature, which impairs its obligation."
>
> *Mercantile Trust Co.* v. *City of Columbus*, 203 U. S. 311-320.

Let it be distinctly observed that the controversy between the City and the company was not over the time when the debt became due, nor over the terms of its payment; but it was whether the City could precipitate the maturity of the debt by legislatively depriving the company of its contract right to have a turnout at a previously agreed point, on the faith of which contract the company's promise of payment had been made. Let it also be then observed that the claim of federal

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protection against the legislative Act of abrogation was not denied on the ground that no impairment of contract had been made, but upon the sole ground that it had not been made in any vital particular. These two observations disclose the whole of the jurisdictional question.

When a claim of constitutional right is distinctly set up and relied on in the State Court, appellate jurisdiction exists, even though the State Court does not decide the question raised, as by resting its decision on some non-federal ground, if the necessary effect of the judgment rendered is to deny the claim of federal right. *Chicago Life Insurance Co.* v. *Needles*, 131 U. S. 574; *Chapman* v. *Goodnow*, 123 U. S. 540; *C., B. & Q. Ry. Co.* v. *Chicago*, 166 U. S. 266; *C., B. & Q. Ry.* v. *Illinois*, 200 U. S. 561; *Nor. Pac. Ry. Co.* v. *Minnesota*, 208 U. S. 583.

Whenever the highest court in a state shall adjudge that not to be a contract which, on the other hand, has been asserted by a litigant to be one, and, being such, to have been impaired by state legislation, a federal question arises, because, as asked in the opinion in one of the cases: "Of what "use would the appellate power be to a litigant who feels "himself aggrieved by some particular state legislation, if "this court should not decide independently of all adjudica-"tions by the Supreme Court of a state, whether or not the "phraseology of the instrument in controversy was expressive "of a contract, and within the protection of the Constitution "of the United States, and that its obligation should be en-"forced notwithstanding a contrary conclusion by the Supreme "Court of a state?" *Jefferson Branch Bank* v. *Skelly*, 66 U. S. (1 Black) 631; *Bridge Proprietors* v. *Hoboken Co.*, 68 U. S. (1 Wall.) 116; *United States* v. *Muscatine*, 75 U. S. (8 Wall.) 575; *Delmas* v. *Merchants Insurance Co.*, 81 U. S. (14 Wall.) 661; *Wright* v. *Nagle*, 101 U. S. (11 Otto) 791.

Another reason advanced by the State Court for pretermitting the decision of impaired contract was as stated in the opinion (Record 31):

> "The right of the company to construct it (the turnout) at the place selected can be determined in the injunction action. A final judgment for the City in that proceeding will demonstrate that the stopping of work on the turnout was rightful and therefore could not be a just ground for the company's refusing to make the promised payment. If, on the other hand, it develops that the injunction was wrongfully issued, the company's remedy for any consequent injury lies in seeking damages therefor."

The statement thus made is a direction to the company to try out in another action the question of the impairment of its contract, and if the contract should be adjudged to have been impaired, to sue in damages for its violation. It is respectfully submitted as a conclusive answer to this proposition that the constitutional prohibition against the impairment of contracts is not satisfied by permitting their impairment and then suing for a money judgment for the wrong done. The injured party is entitled to the preservation of his contract—to the enforcement of it according to its terms—and is not to be put off with a money salve for its violation. There cannot be found a case holding that the non-impairment of contract clause of the Constitution can be satisfied by giving damages for its impairment, as against a demand for its specific fulfillment.

The question of impaired contractual obligation was definitely presented in this case and its decision could not be properly referred to another court in another action at another time. Besides, the State Court had already foreclosed against the company the question of its right to damages for the violation of its ordinance contract. It did it in Case No. 726, the companion case to this one. In that case the com-

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pany had sued, claiming damages for the repeal by the City of a previously granted ordinance franchise, and the court decided against the claim. *Edson as Receiver* v. *Olathe*, 81 Kan. 828, reaffirmed on rehearing, 82 Kan. 4. The *syllabi* to these decisions read as follows:

> "A city is not liable in damages for the repeal of a street railway franchise ordinance which does not engage the city in any private proprietary capacity, nor for the conduct of its officers in publishing and subsequently enforcing the repealing ordinance."
>
> "The state does not guarantee the judgment or fidelity of its officers and agents in their conduct of political affairs, and municipal corporations, erected for purposes of local government, are not liable for misfeasances of their officers when acting in a governmental capacity with respect to matters of general public concern. The principle of *respondeat superior* does not apply in such cases."

The very remedy of damages, therefore, which the court advised the company to pursue as a substitute for the specific fulfillment of its contract the court had already denied to it, on what would seem to be the very novel ground that the City in the granting and repealing of the street franchise acted not in its proprietary business, or, as it were, private capacity, but in virtue of its sovereign legislative capacity, a doctrine which, if sound, would also put Acts of the State Legislature itself first granting and then abrogating franchise contracts beyond the reach of the constitutional prohibition against the impairment of contract obligations.

We respectfully ask that the motions to dismiss be denied.

FRANK DOSTER,
A. F. HUNT, JR.,
A. M. HARVEY,
J. E. ADDINGTON,
Counsel for Plaintiffs in Error.

In the Supreme Court
OF THE UNITED STATES

OCTOBER TERM, 1911.

THE MISSOURI AND KANSAS INTERURBAN RAILWAY COMPANY,
Plaintiff in Error.
vs.
THE CITY OF OLATHE, KANSAS,
Defendant in Error.
No. 727.

Motions to Dismiss and Brief and Argument of Defendant in Error thereon.

MOTION TO DISMISS.

Now comes the City of Olathe, defendant in error, and respectfully states to the Court that the plaintiff in error herein seeks by writ of error to have this Court review and reverse a judgment of the Supreme Court of Kansas affirming a judgment of the District Court of Johnson County against the plaintiff in error for $10,549.50 and costs.

By an ordinance, passed January 28, 1907, the Mayor and Council granted the Missouri and Kansas Interurban Railway Company a franchise to construct a

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railway on certain portions of the streets of Olathe, in consideration of which the Railway Company agreed to pay to the City $9,000 when the road was completed. The company filed specifications of the work to be done under the franchise, making reference to an accompanying plat which showed a turnout or passing track, not otherwise referred to. These specifications were approved by the city council. Afterward the council adopted a resolution by which it undertook to set aside the approval of the specifications so far as they related to the proposed turnout. The city procured a temporary injunction restraining the Railway Company from building this turnout, and the action in which this injunction was granted was still pending undetermined at the time of the trial of this action. The railway was completed in all other respects and in operation before the commencement of this action. The only question in the case was whether the money was due when the suit was brought. The company claimed that the passing track was a part of its road, and that the money was not due until it was completed. The Supreme Court of Kansas held that the location of the turnout was a mere detail, and the right to construct it a question to be determined in the injunction suit; that the right of the city to receive payment did not

depend on the result of that litigation, but had already accrued by reason of the substantial completion and actual operation of the road. The claim of the Railway Company at the trial was that the city council had approved the plans and specifications of the road, that the turnout was a part of the road, and that after the council had approved the specifications it was powerless to change them. The only ground on which a right to a review in this Court is predicated is that the plans when approved became a contract, the obligation of which could not be impaired by the action of the city alone, and that the denial by the city of the right to construct the turnout afforded a full defense to the action. No counterclaim for damages was set up in the answer, but this action of the city was relied on as a full defense to the action. The trial court held against this claim of the defendant and the Supreme Court affirmed its judgment without passing on the merits of its claim with reference to the turnout, or its supposed constitutional protection, but on the ground that these matters were not involved in this case, but to be determined in another appropriate action.

And thereupon the defendant in error moves the Court to dismiss the writ of error herein upon the

grounds and for the reasons following, to-wit:

1. This Court has no jurisdiction of the subject matter of said cause or of any question presented by the record herein.

2. That no claim of title, right, privilege or immunity under the Constitution of the United States was decided by the Supreme Court of Kansas against the plaintiffs in error.

STEPHEN H. ALLEN,
Attorney for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

THE MISSOURI AND KANSAS INTERURBAN RAILWAY COMPANY, a corporation, WILLIAM B. STRANG, F. R. OGG, J. C. KEEPERS, J. H. COSGROVE and GEORGE H. HODGES,
Plaintiffs in Error.

vs.

THE CITY OF OLATHE, KANSAS,
Defendant in Error.

No. 728.

MOTION TO DISMISS.

Now comes the City of Olathe, defendant in error, and respectfully states to the Court that the plaintiffs in error seek by a writ of error herein to have this Court review and reverse a judgment of the Supreme Court of Kansas affirming a judgment of the District Court of Johnson County in favor of the defendant in error against the plaintiffs in error for $1,516.50 and costs.

By an ordinance passed January 28, 1907, the Mayor and Council granted the Missouri and Kansas Interurban Railway Company a franchise to construct a railway on certain portions of the streets of Olathe, in consideration of which the Railway Company agreed to pay to the City $9,000 when the road was com-

pleted. The Company filed specifications of the work to be done under the franchise making reference to an accompanying plat which showed a turnout or passing track, not otherwise referred to. These specifications were approved by the City Council. Afterward the Council adopted a resolution by which it undertook to set aside the approval of the specifications so far as they related to the proposed turnout. The City procured a temporary injunction restraining the Railway Company from building this proposed turnout, and the action in which this injunction was granted was still pending undetermined at the time this action was tried. The railway was completed in all other respects and in operation before the commencement of this action. The only question in the case was whether the money was due when the suit was brought. The Company claimed that the passing track was a part of its road, and that the money was not due until it was completed. The Supreme Court of Kansas held that the turnout was a mere detail, and the right to construct it a question to be determined in the injunction suit; that the right of the City to receive payment did not depend on the result of that litigation, but had already accrued by reason of the substantial completion and actual operation of the road. The claim of the Rail-

way Company at the trial was that the City Council had approved the plans and specifications of the road, that the turnout was a part of the road, and that after the Council had approved the specifications it was powerless to change them. The only ground on which a right to a review in this Court is predicated is that the plans when approved became a contract, the obligation of which could not be impaired by the action of the City alone, and that the denial by the City of the right to construct the turnout afforded a full defense to the action. No counterclaim for damages was set up in the answer, but this action of the City was relied on as a full defense to the action. The trial court held against this claim of the defendant, and the Supreme Court affirmed its decision without passing on the merits of its claim with reference to the turnout, or its supposed constitutional protection, but on the ground that these matters were not involved in this case, but to be determined in another appropriate action.

And thereupon the defendant in error moves the Court to dismiss the writ of error herein upon the grounds and for the reasons following, to-wit:

1. This Court has no jurisdiction of the subject mat-

ter of said action or of any question presented by the record herein.

2. That no claim of title, right, privilege or immunity under the Constitution of the United States was decided by the Supreme Court of Kansas against the plaintiffs in error or either of them.

STEPHEN H. ALLEN,
Attorney for Defendant in Error.

The foregoing motions to dismiss in cases Nos. 727 and 728 are briefed and submitted together by agreement of both parties for the reason that both cases were presented to the Supreme Court of Kansas on the same abstract, and the questions for the consideration of this Court and the records on which they are raised are identical.

BRIEF AND ARGUMENT.

No Federal Question is Presented by the Record in this Case.

The defendants sought to raise the question whether the passage of the resolution setting aside the approval of the specifications operated as an impairment of the contract resulting from such approval. The Court not only declined to pass on this question but declined to consider the controversy concerning the passing

track. It decided the case on the broad ground that the defendant was liable whichever way that question might be resolved, and held that the right to construct a passing track, without which the railway could be and was operated, was a mere matter of detail, and that the denial of the right to construct it afforded no defense to the plaintiffs claim.

"If the judgment of the state court gives no effect to the subsequent law of the state, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract."

Bacon v. Texas, 163 U. S. 207, 216.

New Orleans Waterworks v. La. Sugar Co., 125 U. S. 18.

"We are not authorized by the Judiciary Act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments in their effect impair the obligation of contracts. If we did every case decided in a state court could be brought here when the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held."

Knox v. Exchange Bank, 12 Wall. 370.

St. Paul &c R. Co. v. Todd Co., 142 U. S. 282.

"It is axiomatic that in order to give this Court jurisdiction on writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively, not only that a Federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was

necessary to the determination of the cause, that it was actually decided, or that the judgment as rendered could not have been given without deciding it, and where the decision complained of rests on independent grounds not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this Court without considering any federal question that may also have been presented."

California Powder Works v. Davis, 151 U. S. 389, 393.

Eustis v. Bolles, 150 U. S. 361.

Mo. Pac. R. Co. v. Fitzgerald, 160 U. S. 556.

Gillis v. Stinchfield, 159 U .S. 658.

Seneca Nations v. Christy, 162 U. S. 283.

Diddle v. Bellingham Bay L. Co., 163 U. S. 63.

Harrison v. Morton, 171 U. S. 38.

Pierce v. Somerset, 171 U. S. 641.

McQuade v. Trenton, 172 U. S. 636.

Seeberger v. McCormick, 175 U. S. 274.

We respectfully submit that the foregoing cases are exactly in point and decisive against the jurisdiction of this court, and that the writ of error herein should be dismissed.

STEPHEN H. ALLEN,

Counsel for Defendant in Error.

MISSOURI & KANSAS INTERURBAN RAILWAY COMPANY *v.* CITY OF OLATHE, KANSAS. (No. 2.)

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 727. Motion to dismiss. Submitted November 13, 1911.—Decided December 4, 1911.

When the state court gives no effect to the subsequent law, but decides, on grounds independent of that law, that the right claimed was not conferred by the contract claimed to have been impaired, the case stands as though the subsequent law had not been passed and this court has no jurisdiction. *New Orleans Water Works* v. *Louisiana Sugar Refining Co.*, 125 U. S. 38.

Where a franchisee refuses to pay the agreed compensation on the ground that a subsequent ordinance deprived it of a part of the franchise granted, but the state court decides that it has had substantially everything and that compensation is due without regard to the part affected, no effect is given to the subsequent ordinance, no question of impairing the obligation of the contract is involved, and there being no Federal question this court has no jurisdiction under §§ 709, Rev. Stat.

THE facts are stated in the opinion.

Mr. Frank Doster, Mr. A. F. Hunt, Jr., Mr. A. M. Harvey and *Mr. J. E. Addington*, for plaintiffs in error.

Mr. Stephen H. Allen for defendant in error.

Memorandum opinion by direction of the court. By MR. JUSTICE HUGHES.

Motion to dismiss. The city of Olathe, Kansas, granted to the Railway Company, plaintiff in error, the privilege

of using certain streets for its railway, and the Railway Company agreed to pay therefor the sum of $9,000 when the road was completed. This suit was brought in October, 1908, to recover this amount and the Railway Company defended upon the ground that the road had not been completed and hence that the money was not due. It appeared that the company had built and was operating its railway over the entire route save only a certain "turn out," the construction of which the city prevented. On the trial, evidence was received, over objection, of a resolution adopted by the Mayor and Common Council on March 21, 1910, pending the suit, which purported to set aside their approval of the plans and specification so far as the "turn out" was concerned. But the decision of the court, which went for the city, was not in any sense based on that. The trial court found the facts to be as follows:

"The map or ground plan of the said proposed railway contained a red line indicating the main line of the said railway, over the streets of said city, and in addition to said main railway the Y on Santa Fe Street was indicated on said map. The said map also contained a red line, which indicated a contemplated turn out on East Park Street near the State Institution. The specifications filed with the City Clerk by the defendant company specifies in detail the work therein named, but does not mention the 'turn out' above mentioned. The Mayor and members of the City Council at the time did not know that the red line above mentioned indicated the turn out claimed by the defendant.

"On August 28th, 1907, the city brought an injunction suit restraining the defendant company from laying the said switch or turn out above mentioned, which suit is still pending.

"The said Railway Company laid its main tracks, together with the Y on Santa Fe Street, and commenced operating cars over the entire distance from some time in the

month of August, 1907, and has continued to use said track down to the present time, excepting the period of a few months when the operation of said railway was interrupted by changing from a motor car service to an electric service.

"The turn out above mentioned is not a necessary part of the construction of said road in order to reasonably operate the same throughout said city, and to the terminus, as provided in said ordinance.

"The road as contemplated by said franchise was substantially completed within the meaning of said franchise in the month of August, 1907."

Judgment, entered accordingly, was affirmed by the Supreme Court of the State, and the grounds of its decision are thus stated in its opinion:

"In brief, the question involved is whether the work to be done by the company under the franchise can be regarded as having been completed, in such sense as to make the payment of the $9,000 due, in view of the fact that the city has prevented the construction of the turn out. The company maintains that upon the acceptance of its specifications it acquired a contract right to build the turn out, which cannot be affected by any subsequent action of the city. The city contends that it cannot by contract divest itself of the power to control the use of the streets for the benefit of the public, and that the turn out, if constructed at the point designated, would unreasonably interfere with the use of the street as a highway. These matters need not be determined in this case. They are proper subjects for consideration in the injunction suit. In whatever way they may be determined we think the judgment here appealed from must be affirmed upon the ground that the work of the company authorized by the franchise has long since been substantially completed. The location of the turn out is a mere detail. The right of the company to construct it at the place selected can be determined in the

injunction action. A final judgment for the city in that proceeding will demonstrate that the stopping of work on the turn out was rightful and therefore could not be a just ground for the company's refusing to make the promised payment. If, on the other hand, it develops that the injunction was wrongfully issued the company's remedy for any consequent injury lies in seeking damages therefor, not in delaying payment of the amount agreed upon as the consideration for the granting of the franchise."

It thus plainly appears that the decision did not give effect to the subsequent resolution, which it is asserted impaired the obligation of the contract, but was placed distinctly upon the ground that without regard to that resolution, or to the question of the right of the company to construct the turn out, the money was payable, as the road had been substantially completed. The judgment would have been the same had the resolution not been adopted at all. No effect whatever has been given to it by the state court and this court is without jurisdiction to review its judgment. *Klinger* v. *Missouri*, 13 Wall. 257; *Kennebec Railroad* v. *Portland Railroad*, 14 Wall. 23; *New Orleans Water Works* v. *Louisiana Sugar Refining Company*, 125 U. S. 18; *Winona & St. Peter Railroad* v. *Plainview*, 143 U. S. 371, 392; *Eustis* v. *Bolles*, 150 U. S. 361; *Bacon* v. *Texas*, 163 U. S. 207; *New Orleans Water Works Company* v. *Louisiana*, 185 U. S. 336, 350. As was said by Mr. Justice Gray in *New Orleans Water Works* v. *Louisiana Sugar Refining Company* (125 U. S. pp. 38, 39): "But when the state court gives no effect to the subsequent law, but decides, on grounds independent of that law, that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction."

Dismissed.

MISSOURI & KANSAS INTERURBAN RAILWAY COMPANY *v.* CITY OF OLATHE. (No. 3.)

ERROR TO SUPREME COURT OF THE STATE OF KANSAS.

No. 728. Motion to dismiss. Submitted November 13, 1911.—Decided December 4, 1911.

Decided on authority of preceding case.

Same counsel as in preceding case.

Per Curiam by MR. JUSTICE HUGHES.

In case No. 728 between the same parties the same judgment will be entered as in the preceding case No. 727.